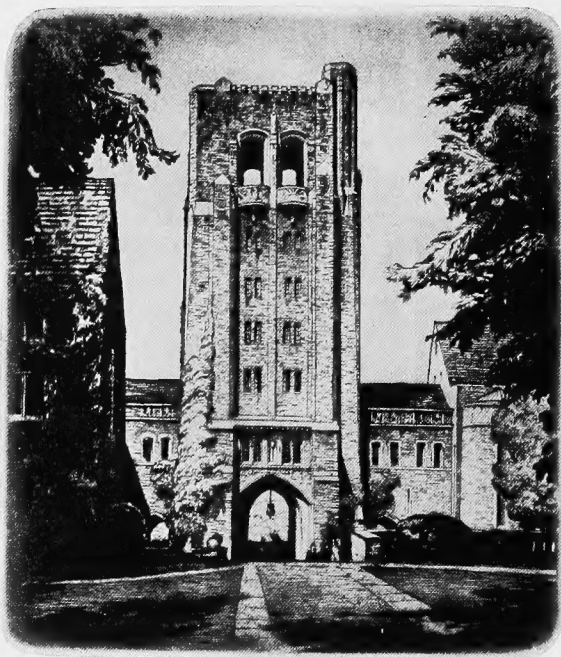


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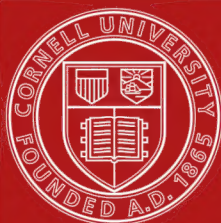
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THE LAW OF WILLS
AND THE
ADMINISTRATION OF ESTATES

ENLARGED EDITION

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A COMPREHENSIVE WORK IN ONE VOLUME

KANSAS CITY, MO.
VERNON LAW BOOK COMPANY
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(BORL. WILLS)

PREFACE TO ENLARGED EDITION

THIS volume is a revision and an enlargement of Notes on the Law of Wills and the Administration of the Estates of Deceased Persons published by me seven years ago. That work was the publication in book form of lectures on the subject which I had delivered yearly to the senior class of the Kansas City School of Law. It was confined in its citations mainly to the law of Missouri and Kansas. It proved a very useful book both for students and practitioners.

The present volume is an enlargement of that work by including all of the leading cases in this country and in England on the subject. It is intended to make this the best one-volume work on the subject. It contains a concise statement of all the principles, in language supported by authority. It contains also an exposition of the reason and relative bearing of the rules. In other words, it is designed to be what the lawyer and student need—a *text* book which places them in *possession* of the subject, and not a running digest of ill-assorted cases.

It will be found of especial value to the Western lawyer and student, as it cites every case and discusses every rule embodied in the common or statute law of the following group of states: Missouri, Arkansas, Nebraska, Kansas, Oklahoma, Texas, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, and California. It cites, also, every case bearing upon the subject decided in the Federal Courts, including the Supreme Court of the United States, the Circuit Courts of Appeals, the Circuit and District Courts, the territorial courts, and the courts of the District of Columbia.

The law of wills in this country unfortunately is in a badly tangled condition. The best-posted lawyers are puzzled when they approach this subject, and their embarrassment is not

relieved, but only increased, by the huge three-volume works on the subject which are thrown at them. They find the subject filled with obsolete rules and archaic principles that plainly have no reference to modern conditions. This work is designed to fill the real purpose of a text book by harmonizing and analyzing the decisions and bringing the law in concrete and definite form down to to-day.

In a good workshop a good tool never grows rusty. It is used until it is worn out, and then, having done its work and earned more than its keep, it is discarded for something better. I hope that will be the case with this book.

WM. P. BORLAND.

September 1, 1914.

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WILLS AND THE ADMINISTRATION OF ESTATES

ENLARGED EDITION

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HISTORY AND NATURE OF WILLS

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- 2. Natural distinction between real and personal property.
- 3. Nature of wills.
- 4. Definition of will.
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- 9. Joint and mutual wills.
- 10. Gifts causa mortis.
- 11. Civil or Spanish law of wills.

§ 1. History

The law concerning wills and the descent and distribution of the estates of deceased persons is a subject which has fascinated the greatest minds of the legal profession from the earliest dawn of the science of English jurisprudence to the present day; and it must continue to exercise a commanding

influence over the attention of the moralist, the statesman and the jurist. The delicacy of the matters with which it deals renders it extremely difficult of application, in spite of the simplicity to which the refinements of modern jurisprudence have reduced its rules. Nowhere do the infirmities of human nature appear in all their hideous nakedness, and nowhere do the hallowed and sometimes unsuspected virtues of commonplace lives shine forth with so clear a lustre as in the musty records of the probate court. Those faded and yellow documents reveal the secret springs of human motives as they are revealed nowhere else this side of the final judgment seat. To a student of human nature, the open pages of a dead man's will, no matter how long ago he may have penned the words, have an absorbing interest from the volumes that may be read between the lines. The whole gamut of human passions finds expression in such instruments: pride, ambition, love, hypocrisy, avarice, charity—every motive from saintly benevolence to malignant revenge.

And what of the living—those who are left behind? Every contest over a will brings to light and exposes to the public view the skeleton in the family closet. There is no wedge so powerful as a will to split families asunder. Rare is he who, like the rough but manly Esau, can find himself turned out upon the desert of life to wrest his fortune from a hostile world, while the supplanting broth-

er Jacob enjoys the parental blessing and the family influence; and yet return without bitterness and greet that brother with kisses and with gifts.

In the science of jurisprudence there are but four separate and distinct legal conceptions. They are like primary elements of the law, which, however much they may, at times, blend into each other or interlock, yet remain separate and distinguishable as legal conceptions; each the center of a distinct group of legal rights. These are:

First: A crime, which is an invasion of the rights of organized society, through the person or property of an individual.

Second: A tort, which is an invasion of the rights of an individual, through his person or property, and which may be also a crime, or be connected with a contractual relation, but is legally independent of either.

Third: A contract, the essence of which is a voluntary agreement between individuals.

Fourth: The devolution of property, the title to which has become vacant by the death of the owner. This embraces (a) wills, which are the expression of the desires of the last owner as to the future title to the property; and (b) the descents and distributions provided by law, which are the expression of the desires or policy of the state as to the disposition of the vacant title.

The first point of view from which to consider this subject is its historical aspect. Wills are of

very ancient origin; so ancient, in fact, that their earliest beginning cannot be determined. They have been traced back through the Roman law to the Grecian, Egyptian and Chaldean. It was once thought that the earliest disposition in the nature of a will was Jacob's bequest to his son Joseph of double the share of his brethren; thus implying that by the custom of that day, in the absence of such will, all the brothers would have shared equally.¹

The law of wills reached a great state of refinement under the Roman law. In the science of law and of government the Romans can lay claim to originality and greatness, however much they may have been dependent upon weaker races for their literature, art and other branches of learning. All the various parts of the group of subjects which are now known in this country and England under the general title of probate law are borrowed from the Roman source.² The very names and legal terms used are acknowledgments of this debt. It is true the word "will" is sturdy Saxon, but "testament," "probate," "codicil," "executor," "administrator,"

¹ But an earlier instance than this has lately been discovered in researches in Egypt. A written will was found which had been executed 2500 years before Christ, in which the testator left his property to his wife for life, with power of appointment among his children, forbidding her to pull down any of the houses. This will was duly signed, witnessed and attested in a manner very similar to the modern form.

² *Starr v. Starr*, 2 Root (Conn.) 303-308.

“guardian,” “curator,” etc., are Latin derivatives which have become technical terms in the law. Many of the rules of this branch of jurisprudence as they exist to-day are substantially borrowed from the Roman or civil law.

We say they are borrowed because with us the Roman law as such has no force or validity. Only in so far as its rules and principles have been adopted and incorporated into the law of England are they a part of our common law. We are the heirs and successors of the Saxons and not of the Romans, and upon this principle all our civil polity rests. When we search among the records of the ancient Saxons for traces of wills and the disposition of the real and personal property of deceased persons, we find very little. The early Saxon law of real property is involved in the greatest obscurity, and hence, also, the law of descent and distributions. As a people they despised those luxuries and refinements of civilization which would lead to the accumulation of personal property, and therefore they treated it as of the most insignificant value. Their real property was bound up in their tribal and national relations and was not at the disposal of private persons. Hence we find nothing definite or of practical value on this subject prior to the Norman conquest of England. There seems, indeed, to have been a Saxon custom, which survived the conquest and is referred to in the Magna Charta, that a man’s personal prop-

erty should be divided into three parts, one of which went to his wife, one to his children, and the third was at his disposal by will. If he had no wife or family, then half was at his disposal. The shares of the wife and children were called their "reasonable parts."⁸

The Norman conquest introduced, or rather established, in England the feudal system of land tenures, and this great change brings us sharply in contact with the distinction, which continued in English jurisprudence down to the last century, between wills of real property and wills of personal property.

The right to will personal property, even by parol, seems to have been tacitly admitted and allowed. Such property was insignificant in value and few disputes arose over it. The doctrine of reasonable parts gradually fell into disuse and the testator could will all of his goods; but the feudal lord claimed the best of the chattels of the deceased tenant under the name of heriot and the church also took its pick of the goods. If a man failed to make a will his goods were seized by the king's officers to secure these rights, and what remained after their tender ministrations of the scanty effects of the mediæval peasants, was hardly worth fighting over.

⁸ Custom of London as defining the common law of reasonable parts and bequests of personal property. *Crain v. Crain*, 17 Tex. 80-92.

Afterward, as a special privilege to the church, the right to administer the effects of intestates—i. e., those who died leaving no will—was granted to the bishop of the diocese. The bishop administered these estates in the ecclesiastical courts. If the deceased left a will, as he might still have done, even by parol, or in the most lax or informal way, this will ousted the bishop of his rights in the estate. It was not intestate, and therefore the bishop lost jurisdiction over it. The executor or those claiming under the will must probate it in the ecclesiastical court; that is, prove in some *ex parte* way the existence of the will. Having done so, the bishop and the ecclesiastical court had no further control over that estate.

The change wrought by the introduction of the feudal system had little effect, it will be seen, upon dispositions by will or otherwise of personal property. The main effect was to hinder and discourage the accumulation of that species of property and thus render it of little importance in the law. But its effect upon dispositions of landed property was immediate and tremendous. As we learn from Blackstone feuds were originally precarious in their nature, and were held by the tenant purely at the will of the lord. At most they were regarded as life estates only, and reverted to the lord as a matter of course at the death of the tenant. It was not until some time after their establishment that they became inheritable; and even then the

heir was admitted more as a matter of grace than a matter of right. Very heavy exactions were imposed upon him for this privilege of succeeding to his ancestor's estate. The unfortunate heir was obliged to pay the first year's revenue of his estate to the lord as a penalty, under the name of primer seisin. If the heir happened to be a minor, he was under the guardianship of the lord until he became of age, and the guardian appropriated all the rents and profits of his land without rendering any account therefor. On arriving at age the heir was obliged to pay the primer seisin out of his dilapidated and plundered estate as a finishing touch to this system of blackmail and extortion. If the tenant died leaving an infant daughter as his heiress, her situation was worse than that of a minor son. Not only was she deprived of all revenue from her patrimony until twelve months after arriving at majority, but the value of her marriage also belonged to the lord. He was entitled to dispose of her hand in marriage to the highest and best bidder for cash; and in this case she never got control of her lands at all unless she survived her husband; for by the marriage a life interest in the rents and profits of her land and an absolute interest in all of her personal property went to her husband.

We see, therefore, that there was no place in the feudal system for a disposition of landed property by will. Wills of landed property, if they had previously existed, were brought to an end by the in-

troductio of that code of law; except as to a few scattering local customs.⁴

At this period of our legal history the feudal system, which had begun in all the ardor of military glory, and which in the hands of the great Conqueror, had been a nationalizing power and a splendid scheme of common defense had degenerated into a mere system of plunder, petty tyranny and extortion.

Such was the condition of the law and of society at the time when the doctrine of uses came into vogue. Uses are said to have been invented by the ecclesiastics for the purpose of evading the statutes passed to restrain religious bodies from acquiring land. Under this plan, real property was conveyed to one person accompanied by secret instructions as to how that property should be held, used or disposed of for the benefit of another person. These secret instructions were supported and enforced by the courts of equity.

A use was, therefore, a cunning legal device or invention for separating the right to the beneficial interest and enjoyment of land from the legal title to the land itself. It was a pure fiction of law by which the title to the land was divided into two branches; one still known as the legal title, and the other known as the use, or equitable title. The legal title was held and conveyed according to the

⁴ No power at common law to devise lands. The power was opposed to feudal policy. *U. S. v. Fox*, 94 U. S. 315-321, 24 L. Ed. 192.

rigid rules of the feudal law. It bore all the feudal burdens and was the only title recognized by the courts of common law. It was in truth, however, a dead husk, an empty shell, a mere title in name only, for the only living and valuable attribute of ownership, namely, the beneficial use and enjoyment, had been taken away from it and invested in the holder of the use or equitable title. This use or equitable title was recognized and enforced only in courts of equity, but it was the controlling force and the only valuable part of the title.

The legal title was like the body chained down to earth, obedient to fixed laws and moving within narrow limitations: the equitable title was like the spirit when it left the body; it took all that was of value with it and soared above the limitations that had formerly held it down. As the equitable title was a mere ideal thing, a product of the judicial imagination, it is apparent that it was very flexible and elastic. It could be put to many uses and dealt with in many ways that were not possible with the legal title. It could emerge from the legal title at any time at the mere wish of the owner of the legal title. Similarly it could sink back into the legal title when no longer needed. In fact, it could appear and disappear by the magic of a lawyer's quill. It was absolutely unfettered by the natural laws of the science of jurisprudence. It could take any form required, and its duration, character and extent were entirely within the con-

trol of its creator. When once this spirit of a title had left its natural body, the legal title, it needed no solid ground to stand on. It did not require actual possession or livery of seizin of the land. No particular estate was needed to support it. A gap or interregnum was not fatal to its life, for the old natural body, the legal title, was always there to catch it if it fell.

In short, it could assume any form or fit any purpose that the imagination of a cunning lawyer could devise.

As soon as the doctrine of uses was firmly established it was taken advantage of by all manner of landed proprietors as a means of escaping the intolerable hardships of the feudal burdens. Uses grew rapidly into favor. One of the most important purposes to which they were put was to enable an owner to devise his land by will. A, being a landowner, would convey his land to B upon such uses as he would appoint by his last will. This was a good use which courts of equity would enforce by requiring the holder of the legal title to convey the land to such persons or in such manner as the testator should designate in his will. Thus the door was opened wide to all manner of conveyances and settlements of property which were not only secret, but might be and often were merely oral; thus largely increasing the difficulty of proof and the liability to fraud and perjury. This was only one among the many evils which

the lack of regulation of this useful form of conveyance engendered, and which occasioned the passage of the famous Statute of Uses, in the twenty-seventh year of the reign of Henry the Eighth, A. D. 1535.⁵ That statute attempted, and was intended, to abolish uses entirely by providing that the legal estate should merge in the equitable estate.

Parliament, instead of making the equitable title—the spirit—go back into the legal title—the body—and stay there, attempted to provide that the legal title—the body—should follow the equitable title—the spirit. This proved to be impossible. Courts construed the statute very strictly. Only a very few uses were abolished by the statute. Most of them survived under the name of trusts.

It was at first supposed, however, that the statute had accomplished a sweeping reform and that the legal title would in all cases follow the beneficial ownership. This would limit very much the purposes to which these equitable titles could be put. It would destroy the power of appointment by will, for the legal title could not follow the equitable title in such a case.

It seemed a great hardship to abolish entirely the power to will lands; and so within five years after the Statute of Uses another statute, called the Statute of Wills, was enacted; 32 Henry VIII,

⁵ *Knorr v. Raymond*, 73 Ga. 749-765.

A. D. 1540; explained by statute 34 Henry VIII. These statutes provided that a man might will all of his lands not held directly of the king, and two-thirds of such lands as he held directly of the king, by his last will in writing. Here is the first direct statutory authority to convey lands by will, and it is distinctly required that the will should be in writing. What form that writing should assume does not appear.⁶

The Statute of Wills, 32 Henry VIII, did not make any change in regard to wills of personal property, which were still governed by the ecclesiastical and common law.⁷

The next important legislation on this subject was in 1676 when the Statute of Frauds, 29 Car. II, c. 3, was passed. This statute, except the two sections (the fourth and seventeenth) referring to contracts, is mainly devoted to wills of real and personal property. It provides that a will of real property shall be in writing signed by the testator and witnessed by three or four witnesses. It also restricts the right to make oral wills of personal property. This statute and the English decisions construing it are the basis of the modern English

⁶ It is well settled that by the common law lands were not devisable except in particular places where custom authorized it. This disability of the common law was partially removed by the statute of 32 Hen. 8, c. 1, which authorized persons having title to land to dispose thereof by will. *Hardenbergh v. Ray*, 151 U. S. 112-119, 14 Sup. Ct. 305, 38 L. Ed. 93.

⁷ *Lewis v. Maris*, 1 Dall. 278-286, 1 L. Ed. 136.

and American legislation on the subject of wills and testaments.

§ 2. Natural distinction between real and personal property

The trend of modern legislation has been to abolish all artificial distinctions between real and personal property and to reduce the rules of wills and the descent of such property to as perfect uniformity as possible. This legislation has not, however, repealed the laws of nature or abolished the inherent difference between the two classes of property, as some jurists and lawyers have hastily concluded.

The difference in their legal status is not wholly the accidental result of the feudal system or of the growth of jurisprudence.

Real property is permanent as to place and enduring as to time. It cannot be moved out of its situs and therefore must always be subject to the local law. It cannot be destroyed or consumed, and its quantity or general quality can be but little altered by successive owners.

Personal property, on the other hand, is movable from its very nature; it can and usually does follow the person of the owner, or may be sent by him to any sovereignty or jurisdiction he may see fit. Its situs therefore is attached by law to the domicile of the owner for the time being, as its destination and use rests largely in his volition. It is usually of a consumable or perishable char-

acter or capable of being changed in form or mingled with other property whereby its identity is practically lost. It is clear that real property, having the fixed and enduring character described, is susceptible of many rules governing successive and divided ownership, which could not, except in the most bungling way, apply to personal property with its movable and perishable nature.

§ 3. Nature of wills

Blackstone, after a careful examination, both historical and philosophical, of the origin and right of property, lays it down that no one has a moral or natural right to be the heir or successor of another. No child or relative, however near, has any moral claim upon the property left by the deceased; neither has any man any natural or indefeasible right to say what shall be done with his property after his death. All such rights are conferred by the State by general law, and the State in so doing looks not to private rights or interests, but to sound public policy. This must be regarded as a fixed principle of our jurisprudence and a starting point in the investigation of this subject. No right of descent or disposition exists unless it is authorized by existing law.

A will is a creature of the statute, the State's privilege to the testator to dispose of what, without the statute of wills and statute of descents, would otherwise belong to the State.⁸

⁸ Marshall, J., in *Briant v. Garrison*, 150 Mo. 670, 52 S. W. 361; Gantt, J., in *Stowe v. Stowe*, 140 Mo. 602, 41 S. W. 951. The right to

The whole subject may be regulated by the State according to its own view of what is best for its own citizens, and may be changed or remodelled as often as it pleases without infringing the private rights of any one.⁹

take property by will or descent is derived from and regulated by municipal law. *Plummer v. Coler*, 178 U. S. 115, 20 Sup. Ct. 829, 44 L. Ed. 998; *Estate of Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104; *Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414; *Wilmerding's Estate*, 117 Cal. 284, 49 Pac. 181; *Sharp v. Loupe*, 120 Cal. 91, 52 Pac. 134; *Spreckels v. Spreckels*, 116 Cal. 344, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; *Benalack v. Richards*, 116 Cal. 408, 48 Pac. 622; *Barker v. Bell*, 46 Ala. 216; *Stone's Appeal*, 74 Conn. 301, 50 Atl. 734; *Hatheway v. Smith*, 79 Conn. 506, 65 Atl. 1058, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99; *Paul v. Ball*, 31 Tex. 10-14.

⁹ A will conveys no interest till the death of the testator, and is affected by change of statute in the meantime. *O'Brien v. Ash*, 169 Mo. 298, 69 S. W. 8; *Hoffman v. Hoffman*, 26 Ala. 535; *Welsh v. Pounders*, 36 Ala. 668; *Estate of McCloud*, Myr. Prob. (Cal.) 23; *Barkers' Estate*, Myr. Prob. (Cal.) 78; *Jones v. Johnson*, 67 Ga. 269; *Heidt v. Heidt*, 115 Ga. 965, 42 S. E. 263; *Carroll v. Carroll*, 20 Tex. 731-746. The right to dispose of one's property by will is not a vested right, beyond the power of the legislature to withdraw or limit. *Ferguson v. Gentry*, 206 Mo. 189, 104 S. W. 104.

A statute was passed after the death of the testator, validating an unattested will, so as to entitle it to probate. Held, not unconstitutional as an exercise of judicial power. Question whether heirs had any vested rights at time of passage of the statute which could not be taken away by legislative act, was not decided, because no heirs appeared. Only interest involved was held to be state's right of escheat which it might waive. *In re Estate of Sticknoth*, 7 Nev. 223.

§ 4. Definition of will

A "will" is defined to be the legal declaration of a man's intention touching the disposition of his property to take effect after his decease.¹⁰

The words "will" and "testament" are now used interchangeably and there is no distinction in our modern law in the meanings of these two words. Formerly, a testament was one in which an executor was appointed. There was also at one time a distinction existing by which a disposition of personal property was called a testament and that of real estate a will, but all of these distinctions have been abolished and the words now mean precisely the same in law.¹¹

§ 5. Codicils

A "codicil" is a supplement or addition to a will made by the testator and is annexed to or to be taken as part of the will, by which the original dispositions contained in the will are explained, added to or altered.¹² For all general purposes a cod-

¹⁰ 2 Blackstone's Commentaries, p. 499; *Rice v. Rice*, 68 Ala. 216; *Jordan v. Jordan*, 65 Ala. 301; *Daniel v. Hill*, 52 Ala. 430; *Woods' Estate*, 36 Cal. 75; *Colton v. Colton*, 127 U. S. 300-309, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Starr v. Starr*, 2 Root (Conn.) 303-308; *Jacobs v. Button*, 79 Conn. 360, 65 Atl. 150; *Hatheway v. Smith*, 79 Conn. 506, 65 Atl. 1058, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99; *Griffin v. Morgan* (D. C.) 208 Fed. 660.

¹¹ There is no distinction between "will" and "testament." *Compton v. McMahan*, 19 Mo. App. 505.

¹² 2 Blackstone's Commentaries, p. 500; *Home for Incurables v. Noble*, 172 U. S. 383, 19 Sup. Ct. 226, 43 L. Ed. 486; *In re Zeile*, 74 Cal. 125, 15 Pac. 455.

icil is to be considered included in the term "will," wherever it occurs in the statutes or otherwise; a codicil is simply one kind of will, i. e., a supplementary will, and has the same attributes, and must be executed with the same formalities and is construed and carried out in the same manner as any other kind of will.¹³ The distinction between a will and a codicil properly so-called, is this: a will is usually intended to revoke and has the effect of revoking all previous wills; whereas a codicil acknowledges the existence of and leaves in full force the previous will to which it is supplementary, except so far as it undertakes expressly to alter its terms.¹⁴ A codicil, therefore, usually comprises a part of a previously executed will; but a will is an independent instrument and if valid revokes and takes the place of previous testamentary instruments. A codicil need not be attached to the original will, if it clearly identifies the will to which it relates.¹⁵

¹³ *Watson v. Turner*, 89 Ala. 220, 8 South. 20.

¹⁴ *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Grimball v. Patton*, 70 Ala. 626; *Hemphill v. Moody*, 62 Ala. 510; *Mason v. Smith*, 49 Ala. 71; *Gelbke v. Gelbke*, 88 Ala. 427, 6 South. 834; *Boyd v. Boyd* (C. C.) 2 Fed. 138; *Estate of Plumel*, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100; *Flinn v. Frank*, 8 Del. Ch. 186, 68 Atl. 196; *Grigsby v. Willis*, 25 Tex. Civ. App. 1, 59 S. W. 574; *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441.

¹⁵ *Ferrell v. Gill*, 130 Ga. 534, 61 S. E. 131, 14 Ann. Cas. 471.

§ 6. Right to exclude heirs

In most of the civilized nations of the world a restriction has been placed on the power of parents to deprive their children of all share in their estates. In ancient Rome, the power of fathers over their estates was unlimited. They had also the absolute power of life and death over their sons. In process of time the children became entitled to a legal portion of the estate of their parents, of which they could not be deprived, and this is the rule, with various modifications, very generally adopted by civilized nations. Such was the ancient rule of the common law as it stood in the time of Henry the Second. By this a man's goods were to be divided into three equal parts, one for the heirs, another for the wife, and the third was at his own disposal. By imperceptible degrees this law has entirely changed, and the deceased in England and in most of the states under the common law can dispose by will or otherwise of his estate.

By the Roman law, as quoted by Blackstone,¹⁶ "testaments were set aside as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) any of the children of the testator."¹⁷ But if the child had any legacy, though ever so

¹⁶ 2 Blackstone's Commentaries, p. 502.

¹⁷ This was the rule of the Spanish law. *Meegan v. Boyle*, 19 How. 130-149, 15 L. Ed. 577.

small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some substantial cause; and in such case no *querela inofficiosi testamenti* was allowed. Hence probably has arisen that groundless vulgar error of the necessity of leaving the heir a shilling, or some other express legacy, in order to disinherit him effectually; whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore though the heir or next of kin be totally omitted, it admits no *querela inofficiosi* to set aside such a testament."

In the English and American law it is well settled that, in the absence of some local statute, a testator has the right to dispose of all his property to the exclusion of his heirs.¹⁸

¹⁸ *Elliott v. Welby*, 13 Mo. App. 19; *Benoist v. Murrin*, 58 Mo. 326; *Guitar v. Gordon*, 17 Mo. 411; *Block v. Block*, 3 Mo. 594; *Estate of McGinn*, 3 Coffey Prob. Dec. (Cal.) 26; *Morris v. Watterson*, 130 Ga. 442, 60 S. E. 1045; *In re McMillen*, 12 N. M. 31, 71 Pac. 1083; *Linnay v. Peloquin*, 35 Tex. 29.

The effect of adopting a child under the statute is to put it in the same attitude towards the adopting parents as if it had been their child, but does not prevent their disposing of their property by will in disregard of the rights of such child as heir. *Clark v. West*, 96 Tex. 437, 74 S. W. 797; *Pemberton v. Perrin*, 94 Neb. 718, 144 N. W. 164.

§ 7. Rights of pretermitted children by statute

As the right to make a will and transfer property by bequest is not a natural right, but a creation of positive law, it may certainly be so regulated as to harmonize with the institutions and policy of the country, and especially so as to require one who can no longer enjoy his property to so dispose of his acquisitions as to secure a portion for the comfort of those who by his agency were brought into the world, and for whose support he is bound by the dictates of natural duty and the impulses of affection. And as the reasons for restrictions on testamentary power are expressed with great cogency and brevity in the following extract from Cooper's *Justinian* (page 486) I shall cite it in its terms, viz.:

When we consider the many capricious, not to say senseless and unjust dispositions of property, that take place in countries where an unlimited right of devising is permitted, the neglect of children and relations for the sake of gratifying a selfish vanity or a death bed superstition; the culpable fondness of power that would extend for a century or two, or perpetuate if possible the control of a weak and dying man, over property that he can no longer enjoy, as in the will of Mr. Thellusen; when we consider, further, that those whom we bring into existence have a right to call upon us to make that existence as comfortable as we are able, without unreasonably sacrificing our own comforts—we shall probably incline to think that some restrictions on the right of devising are neither inexpedient nor unjust.¹⁹

¹⁹ *Crain v. Crain*, 17 Tex. 80-89.

In most if not all of the States of the Union, therefore, there are statutory provisions securing to children or their descendants not mentioned or provided for in the will the rights they would have had in the estate of the ancestor if he had died intestate. These statutes differ in wording, but their general purpose is the same—the protection of the child against unintentional omission.

They do not go to the extent of the civil or Spanish law, making the child a forced heir who cannot be disinherited without legal reason set forth in the will.²⁰ The statutes still leave the ancestor free to disinherit the child in accordance with the English policy provided it is deliberately and intentionally done.²¹

²⁰ This was the early law of Texas. Statute of 1840 as to forced heirs repealed in 1856. A will made previous to the act of 1856 is governed by that statute if the testator died after its passage. Forced heirs as they existed formerly had no rights in the property of the ancestor which might not be defeated by a change of the law. *Hamilton v. Flinn*, 21 Tex. 713.

²¹ *Peters v. Siders*, 126 Mass. 135, 30 Am. Rep. 671; *Terry v. Foster*, 1 Mass. 146, 2 Am. Dec. 6; *Wild v. Brewer*, 2 Mass. 570; *Church v. Crocker*, 3 Mass. 17; *Wilder v. Goss*, 14 Mass. 359; *Wilson v. Fosket*, 6 Metc. (Mass.) 400, 39 Am. Dec. 736; *Merrill v. Sanborn*, 2 N. H. 499; *C., B. & Q. Ry. v. Wasserman* (C. C. Neb.) 22 Fed. 872; *Bresee v. Stiles*, 22 Wis. 120; *Walker v. Hall*, 34 Pa. 483; *Waterman v. Hawkins*, 63 Me. 156; *Bloom v. Straus*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563; *In re McMillen*, 12 N. M. 31, 71 Pac. 1083; *Morris v. Morris Ex'r*, 4 Houst. (Del.) 414-428; *Loring v. Marsh*, 6 Wall. 337, 18 L. Ed. 802; *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718, 115 Am. St. Rep. 568, 8 Ann. Cas. 632; *Hargadine v. Pulte*, 27 Mo. 423; *Bradley v. Bradley*, 24 Mo. 311; *Smith v. Sweringen*, 26 Mo. 551; *Block v. Block*, 3 Mo. 594; *In re Brown's Estate*, 22 Okl. 216, 97 Pac. 613;

Where a child appears to have been omitted, the statutes generally raise a presumption that the omission was unintentional,²² although some put the burden of proof on the omitted child.²³ When the burden of proof is on the omitted child to show that the omission was by mistake or inadvertence, parol evidence is admitted for that purpose.²⁴ But where the statute itself raises the presumption in favor of the omitted child, parol evidence is sometimes admitted to rebut this presumption,²⁵ but

Arnold v. Arnold, 62 Ga. 627; *Branton v. Branton*, 23 Ark. 569; *Morgan v. Davenport*, 60 Tex. 230; *Evans v. Anderson*, 15 Ohio St. 324; *Lowrey v. Harlow*, 22 Colo. App. 73, 123 Pac. 143.

The law having provided that minor children have rights in the homestead of their father, such rights cannot be destroyed by the will of the father providing otherwise. *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82. Statute of omitted children applies to foreign will which seeks to transmit lands in this State. *Crossett Lbr. Co. v. Files*, 104 Ark. 600, 149 S. W. 908. Failure to name or provide for nephews or nieces raises no presumption that they were forgotten. *Keegan's Estate*, 139 Cal. 123, 72 Pac. 828.

²² *In re Atwood's Estate*, 14 Utah, 1, 45 Pac. 1036, 60 Am. St. Rep. 878; *Coulam v. Doull*, 4 Utah, 267, 9 Pac. 568; s. c., 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596. The object of the statute in regard to pretermitted heirs is not to compel the testator to make provision for any child, but solely to protect the children against forgetfulness, omission or oversight, and the failure to allude to them in the will is made evidence that they were omitted through forgetfulness of their existence. *Estate of Callaghan*, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689.

²³ *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718, 115 Am. St. Rep. 568, 8 Ann. Cas. 632.

²⁴ *Brown v. Brown*, 71 Neb. 200, 98 N. W. 718, 115 Am. St. Rep. 568, 8 Ann. Cas. 632.

²⁵ *In re Atwood's Estate*, 14 Utah, 1, 45 Pac. 1036, 60 Am. St. Rep. 878; *Coulam v. Doull*, 4 Utah, 267, 9 Pac. 568; s. c., 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596.

more often not. The general rule is that whether the child is mentioned or provided for must appear from a fair construction of the will, unaided by extrinsic testimony.²⁶ This has given rise to many cases on the question whether the will shows by a fair construction that the particular child was not overlooked or forgotten by the testator, but was either intentionally excluded or intended to be included in some general provision.²⁷

²⁶ *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657; *Bradley v. Bradley*, 24 Mo. 311; *Wetherall v. Harris*, 51 Mo. 65; *Pounds v. Dale*, 48 Mo. 270; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Garrauds' Estate*, 35 Cal. 336; *Utz's Estate*, 43 Cal. 200; *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689. Except to correct a misnomer. *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642.

²⁷ Naming of a son-in-law, sufficient to exclude his wife. *Hocken-smith v. Slusher*, 26 Mo. 237. Bequest by name to son-in-law is not a naming of his children, the grandchildren of testator by a deceased daughter. *Meyers v. Watson*, 234 Mo. 286, 136 S. W. 236. Providing for testator's children as a class is sufficient naming. *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373; *McCourtney v. Mathes*, 47 Mo. 533; *Beck v. Mietz*, 25 Mo. 70. Contra: *Arnold v. Arnold*, 62 Ga. 627. Mention in codicil sufficient. *Payne v. Payne*, 18 Cal. 291. Mention of children in committing them to discretion of mother is sufficient to avoid statute providing that omitted child shall take a child's part unless it shall appear that the omission was intentional. *Hunt v. Hunt*, 11 Nev. 442. Mentioning a child who was dead at the making of the will is not sufficient mention of his living children. *Gray v. Parks*, 94 Ark. 39, 125 S. W. 1023; *Estate of Ross*, 140 Cal. 282, 73 Pac. 976. Contra: *Guitar v. Gordon*, 17 Mo. 408; *Fugate v. Allen*, 119 Mo. App. 183, 95 S. W. 980.

Devise to grandson does not show intentional omission of living children as matter of legal construction. *Bush v. Lindsey*, 44 Cal. 121. Contra: *Woods v. Drake*, 135 Mo. 393, 37 S. W. 109. Naming of testator's grandchild is sufficient naming of her child. *King v. Pyrne*, 92 Ark. 88, 122 S. W. 96. Grandchildren not embraced in term "children" so as to be expressly excluded by terms of will.

As to the remedy of a pretermitted heir to recover his share of his ancestor's estate there has been some diversity of opinion. The will is not for that reason void;²⁸ it is entitled to probate, the title of the devisees under it is good against strangers, and the title remains in the devisees until the pretermitted heir asserts his rights.²⁹ A suit to set aside the will, therefore, is not proper.³⁰ In a few cases the heir has been permitted to maintain an action for the property, such as ejectment and partition;³¹ but, inasmuch as the statute requires that the pretermitted heir be charged with advancements and provides that the devisees shall refund only their proportional part of the estate received, a bill for contribution in equity would seem to be the better remedy.³² The interest of a pre-

Utz Estate, 43 Cal. 200. Sufficient mention. *Rhoton v. Blevin*, 99 Cal. 645, 24 Pac. 513; *Estate of Callaghan*, 119 Cal. 571, 51 Pac. 860, 39 L. R. A. 689. Child "mentioned" within meaning of statute avoiding will in favor of afterborn child not provided for or mentioned. Authorities in U. S. reviewed. *Pearce v. Pearce*, 104 Tex. 73, 134 S. W. 210.

²⁸ *Trotter v. Trotter*, 31 Ark. 145; *Orr v. O'Brien*, 55 Tex. 149. Except in the case where *all* the heirs are omitted and the entire estate is devised to a stranger in blood. *Burch v. Brown*, 46 Mo. 441.

²⁹ *Chouquette v. Barada*, 23 Mo. 331; *Id.*, 28 Mo. 491.

³⁰ *Schneider v. Koester*, 54 Mo. 500.

³¹ *McCracken v. McCracken*, 67 Mo. 590; *Thomas v. Black*, 113 Mo. 66-69, 20 S. W. 657; *Breidenstein v. Bertram*, 198 Mo. 328, 95 S. W. 828; *Vantine v. Butler*, 250 Mo. 445, 157 S. W. 588; *Rowe v. Allison*, 87 Ark. 207, 112 S. W. 395.

³² *Levins v. Stevens*, 7 Mo. 90; *Hill v. Martin*, 28 Mo. 78; *Boyer v. Dively*, 58 Mo. 510; *Branton v. Branton*, 23 Ark. 569; *Evans v. Opperman*, 76 Tex. 293, 13 S. W. 312; *Morris v. Morris Ex'r*, 4 Houst.

termitted heir is a vested interest with the usual incidents, and will pass to his heirs and representatives in case of his death.³³ The will, though a nullity as to him, is yet color of title in the devisee which will ripen by adverse possession.³⁴

§ 8. Agreements to make disposition by will

A contract to make a particular will, or to make a particular disposition of property by will is valid and binding, if founded upon a sufficient consideration.³⁵ Partial performance of a verbal contract of this kind will take it out of the operation of the Statute of Frauds when a refusal to complete the contract would work a fraud on the other party.³⁶

(Del.) 414-431; *Warren v. Morris*, 4 Del. Ch. 289; *Trotter v. Trotter*, 31 Ark. 145; *In re Brown's Estate*, 22 Okl. 216, 97 Pac. 613; *Ross' Estate*, 140 Cal. 282, 73 Pac. 976. Parties cannot litigate their rights as forced heirs in an action of trespass to try title to land. A direct action is necessary on the part of those claiming rights as forced heirs. *Acklin v. Paschal*, 48 Tex. 147. Pretermitted heir who sues for his share may be charged with advancements he received in testator's lifetime. *Parker v. Parker*, 10 Tex. 83-89. Contract for contingent fee for recovery of estate of pretermitted minor heir is subject to supervision by court. *Everson v. Hurn*, 89 Neb. 716, 131 N. W. 1130.

³³ *Schneider v. Koester*, 54 Mo. 500; *State ex rel. v. Pohl*, 30 Mo. App. 321.

³⁴ *Charle v. Saffold*, 13 Tex. 94; *Portis v. Cummings*, 14 Tex. 171.

³⁵ *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; *Sutton v. Hayden*, 62 Mo. 112; *Napier v. Trimmier*, 56 Ga. 300; *Banks v. Howard*, 117 Ga. 94, 43 S. E. 438; *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802; *Cobb v. Macfarland*, 87 Neb. 408, 127 N. W. 377; *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486.

³⁶ *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. 107, 60 Am. St. Rep.

The case out of which such a contract usually arises is where parents agree to will certain land to particular children in consideration of care and support, or a child has been adopted under an agreement that in consideration of affection and dutiful obedience on the part of the child, a particular provision shall be made in his favor.

Sometimes the contract grows out of business transactions between partners, relatives or others.³⁷ These contracts will support an action at law against the estate of the deceased contractor,³⁸

270, reversing s. c., 16 Mo. App. 80; *Fuchs v. Fuchs*, 48 Mo. App. 18; *Gupton v. Gupton*, 47 Mo. 37; *Ackerson v. Fly*, 99 Mo. App. 116; *Rhodes v. Rhodes*, 3 Sandf. Ch. (N. Y.) 279; *Shahan v. Swan*, 48 Ohio St. 25, 26 N. E. 222, 29 Am. St. Rep. 517; *Winne v. Winne*, 166 N. Y. 263, 59 N. E. 832, 82 Am. St. Rep. 647; *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4, 43 L. Ed. 427, 74 Am. St. Rep. 490; *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528; *Best v. Gralapp*, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491.

A will, lease and deed made at the same time may be construed together. *Jack v. Hooker*, 71 Kan. 652, 81 Pac. 203. Agreement to will lands taken out of statute of frauds by performance. Where father for valuable consideration agreed to will land to his daughter and did execute the will and afterward destroyed it, the contract will be enforced against his heirs. Execution of will in pursuance of the contract takes it out of Statute of Fraud. *Naylor v. Shelton*, 102 Ark. 30, 143 S. W. 117, Ann. Cas. 1914A, 394; *Dalby v. Maxfield*, 244 Ill. 214, 91 N. E. 420, 135 Am. St. Rep. 312; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 66 Am. Dec. 773.

³⁷ *McKinnon v. McKinnon*, 56 Fed. 409, 5 C. C. A. 530, reversing s. c., 46 Fed. 713; *Croft v. Layton*, 68 Conn. 91, 35 Atl. 765.

³⁸ *Hudson v. Hudson*, 87 Ga. 678, 13 S. E. 583, 27 Am. St. Rep. 270; *Hull v. Thoms*, 82 Conn. 647, 74 Atl. 925; *Banks v. Howard*, 117 Ga. 94, 43 S. E. 438; *Heery v. Reed*, 80 Kan. 380, 102 Pac. 846. But not during lifetime of proposed testator. *Warden v. Hinds*, 163

or may be enforced specifically in equity,³⁹ or by fastening a trust upon the property in the hands of the heirs or devisees.⁴⁰ For equity to enforce

Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529. Declarations of testator are not admissible. *Gunter v. Gunter*, 174 Fed. 933, 98 C. C. A. 545.

³⁹ *Hood v. McGehee*, 189 Fed. 205, 117 C. C. A. 664; *Jones v. Perkins* (C. C.) 76 Fed. 82; *Berg v. Moreau*, 199 Mo. 421, 97 S. W. 901, 9 L. R. A. (N. S.) 157; *Wright v. Tinsley*, 30 Mo. 389; *Newton v. Lyon*, 62 Kan. 306, 62 Pac. 1000; *Id.*, 62 Kan. 651, 64 Pac. 592; *Whitney v. Hay*, 15 App. D. C. 164; *Coveney v. Conlin*, 20 App. D. C. 303; *McCreary v. Gewinner*, 103 Ga. 528, 29 S. E. 960; *Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396; *Forrister v. Sullivan*, 231 Mo. 345, 132 S. W. 722; *Purcell v. Corder*, 33 Okl. 68, 124 Pac. 457; *Peterson v. Bauer*, 76 Neb. 652, 107 N. W. 993, 111 N. W. 361, 124 Am. St. Rep. 812; *Nelson v. Schoonover*, 89 Kan. 388, 131 Pac. 147; *Bless v. Blizzard*, 86 Kan. 230, 120 Pac. 230; *Anderson v. Anderson*, 75 Kan. 117, 88 Pac. 743, 9 L. R. A. (N. S.) 229; *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, 25 L. R. A. 207, 43 Am. St. Rep. 685; *Schoonover v. Schoonover*, 86 Kan. 487, 121 Pac. 485, 38 L. R. A. (N. S.) 752; *Best v. Gräflapp*, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491; *Howe v. Watson*, 179 Mass. 30, 60 N. E. 415; *Bird v. Jacobus*, 113 Iowa, 194, 84 N. W. 1062; *Whiton v. Whiton*, 179 Ill. 32, 53 N. E. 722; *Merrill v. Thompson*, 252 Mo. 714, 161 S. W. 674.

⁴⁰ *Dean v. Oliver*, 131 Ala. 637, 30 South. 865; *Allen v. Bromberg*, 147 Ala. 317, 41 South. 771; *Nible v. Metcalf*, 157 Ala. 295, 47 South. 1007; *Russ v. Mebius*, 16 Cal. 350; *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008; *Belt v. Lazenby*, 126 Ga. 767, 56 S. E. 81; *Price v. Price*, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529; *Duval v. Duval*, 54 N. J. Eq. 581, 35 Atl. 750; s. c., 56 N. J. Eq. 375, 39 Atl. 687, 40 Atl. 440; *Bruce v. Moon*, 57 S. C. 60, 35 S. E. 415; *Fogle v. St. Michael Church*, 48 S. C. 86, 26 S. E. 99; *Smith v. Pierce*, 65 Vt. 200, 25 Atl. 1092; *Burdine v. Burdine*, 98 Va. 515, 36 S. E. 992, 81 Am. St. Rep. 741; *Best v. Gralapp*, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491; *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486; *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802; *Brown v. Webster*, 87 Neb. 788-791, 128 N. W. 635; *Keefe v. Keefe*, 19 Cal. App. 310, 125 Pac. 929.

specifically an oral contract under such circumstances the proof of the contract must be very clear and cogent,⁴¹ especially if the deceased left a valid will making a different disposition of the property.⁴² The Courts have lately shown a tendency, while not departing from the rule, to hold the plaintiff to the strictest proof of the exact terms of the agreement

A binding promise to dispose of property in a certain way cannot be affected by a subsequent will, although the will itself is valid and entitled to probate.⁴³ Where there is an attempt made in the will to fulfill the obligation and the person entitled accepts the provisions of the will, the contract is discharged.⁴⁴ It seems that the promisee

⁴¹ *Asbury v. Hicklin*, 181 Mo. 658, 81 S. W. 390; *Grantham v. Gossett*, 182 Mo. 651, 81 S. W. 895; *Rosenwald v. Middlebrook*, 188 Mo. 58, 86 S. W. 200; *Russell v. Jones*, 135 Fed. 929, 68 C. C. A. 487; *Russell v. Agar*, 121 Cal. 396, 53 Pac. 926, 66 Am. St. Rep. 35; *Schaadt v. Mut. Life Ins. Co.*, 2 Cal. App. 715, 84 Pac. 249; *Ockstadt v. Bowles*, 34 App. D. C. 58; *Peterson v. Bauer*, 76 Neb. 652, 107 N. W. 993, 111 N. W. 361; *Bichel v. Oliver*, 77 Kan. 696, 95 Pac. 396; *Baumann v. Kusian*, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756.

Proof insufficient to establish contract. *Studer v. Seyer*, 69 Ga. 125; *Cooper v. Claxton*, 122 Ga. 596, 50 S. E. 399; *Bunting v. Dobson*, 125 Ga. 447, 54 S. E. 102; *Wilmer v. Borer*, 4 Kan. App. 109, 46 Pac. 181; *Brand v. Ray*, 156 Mo. App. 622, 137 S. W. 623; *Labs v. Labs*, 92 Neb. 378, 138 N. W. 561; *West v. Clark*, 28 Tex. Civ. App. 1, 66 S. W. 215; *Pugh v. Bell*, 21 Cal. App. 530, 132 Pac. 286.

⁴² *Kinney v. Murray*, 170 Mo. 674, 71 S. W. 197; *McKee v. Higbee*, 180 Mo. 263, 79 S. W. 407.

⁴³ *Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107; *Brown v. Webster*, 87 Neb. 788-791, 128 N. W. 635.

⁴⁴ *Miller's Adm'r v. Miller*, 5 Har. (Del.) 333; *Lee's Appeal*, 53 Conn. 363, 2 Atl. 758. See a curious and unsuccessful attempt to

in such a contract, who has performed his part of the agreement, has remedies even during the lifetime of the promisor, to restrain alienation or charge the property with a trust where the promisor conveys or attempts to convey it away in fraud of the agreement.⁴⁵

§ 9. Joint and mutual wills

A joint will is a single instrument executed by two or more testators, and is usually made for the purpose of disposing of some joint property.⁴⁶ It is ordinarily considered to be revocable as the separate will of either.⁴⁷ Mutual wills are those made by two or more testators each executing his separate will in favor of the other or others.⁴⁸ If this is done by virtue of a valid agreement, it is evident

settle a tort by agreement for a legacy and the dishonest result which legal chicanery accomplished. *Drinkhouse v. Merritt*, 134 Cal. 580, 66 Pac. 785; *Sutro's Estate*, 139 Cal. 87, 72 Pac. 827.

⁴⁵ *Teske v. Dittberner*, 65 Neb. 167, 91 N. W. 181, 101 Am. St. Rep. 614; *Gregor v. Kemp*, 3 Swans. 404; *Jones v. Martin*, 5 Ves. 266; *Fortescue v. Humal*, 19 Ves. 67; *Crain v. Crain*, 17 Tex. 80-98.

⁴⁶ *Romjue v. Randolph*, 166 Mo. App. 87, 148 S. W. 185; *March v. Huyter*, 50 Tex. 243; *Estate of Anderson*, 14 Ariz. 502, 131 Pac. 975.

⁴⁷ *Cawley's Estate*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93; *Allen v. Allen*, 28 Kan. 18; *Paton v. Robinson*, 81 Conn. 547, 71 Atl. 730; *Lewis v. Scofield*, 26 Conn. 455, 68 Am. Dec. 404; *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; *Hill v. Harding*, 92 Ky. 76, 17 S. W. 199, 437; *In re Davis' Will*, 120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771; *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135.

⁴⁸ *Estate of Cross*, 163 Cal. 778, 127 Pac. 70; *Carle v. Miles*, 89 Kan. 540, 132 Pac. 146; *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003; *Ex parte Day*, 1 Bradf. Sur. (N. Y.) 476; *In re Will of Diez*, 50 N. Y. 88.

that a careful practitioner should preserve some extrinsic evidence of the agreement.

It has been held by some courts that mutual wills do not in themselves raise a contractual relation and the validity of each is to be judged separately.⁴⁹ But by other courts it has been held that a joint and mutual will may, of itself, be evidence of an agreement which, after it has been performed by the death of one of the parties, may become a fixed obligation upon the property of the other.⁵⁰ The better opinion seems to be that even though the will be made in pursuance of a contract, it is nevertheless revocable, leaving the party for whose benefit the contract was made to his remedy in equity or otherwise on the contract.⁵¹ These cases are rather difficult to deal with on account of the principle that wills are ambulatory, i. e., rev-

⁴⁹ *Mullen v. Johnson*, 157 Ala. 262, 47 South. 584; *Coveney v. Conlin*, 20 App. D. C. 303-329; *Edson v. Parsons*, 85 Hun, 263-265, 32 N. Y. Supp. 1036; s. c., 155 N. Y. 555-565, 50 N. E. 265.

⁵⁰ *Bower v. Daniel*, 198 Mo. 320, 95 S. W. 347; *Wyche v. Clapp*, 43 Tex. 543.

⁵¹ *Matter of Gloucester (Sur.)* 11 N. Y. Supp. 899; *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Supp. 961; s. c., 157 App. Div. 553, 142 N. Y. Supp. 962; *Frazier v. Patterson*, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508, 17 Ann. Cas. 1003; *Ross v. Woolard*, 75 Kan. 383-386, 89 Pac. 680.

Mutual or reciprocal wills based on a contract, the consideration for which is the mutual promise—such contract is performed by the survivor by allowing her will to remain unchanged during lifetime of the other. Where either party to such contract commits a breach of the same by subsequently executing another will, devising and bequeathing his estate contrary to the terms of the contract and dies, the survivor upon proof of a continued performance thereof in good faith is entitled to a specific performance of the contract as against

ocable at any time during the life of the maker. Ordinarily they are probated as the separate will of the one that dies first,⁵² but it has been held that if the will so provide and the disposition made of the property requires it probate may be delayed until the death of both or all of the testators.⁵³

§ 10. Gifts causa mortis

Another form of testamentary disposition of property which is closely akin to wills, and which yet is of a distinct class, is gifts causa mortis. Such gifts occupy a middle ground between wills and transactions inter vivos, partaking partly of the nature of each. A gift causa mortis is a gift of personal property made by the donor in contemplation of and immediately prior to his death, and consummated by delivery to the donee, subject only to the condition that if the donor does not die

the heirs, devisees, legatees and executors of the decedent. Statement that such wills made in pursuance of contract are not ambulatory is dicta. *Brown v. Webster*, 90 Neb. 591, 134 N. W. 185, 37 L. R. A. (N. S.) 1196.

⁵² *Wyche v. Clapp*, 43 Tex. 543; *In re Estate of Hansen*, 87 Neb. 567, 127 N. W. 879. There can be no such thing as a joint will to take effect upon the death of the survivor. A will must take effect at the death of the testator and not at some time in the future. *Hershby v. Clark*, 35 Ark. 17, 37 Am. Rep. 1.

A joint will disposing of property owned in common, out of which debts and legacies exceeding the single share of either testator are to be paid, and postponing probate until the death of the surviving testator, presents a scheme which is legally impossible to carry out on the death of one only of the joint testators, and hence such testator must be held to have died intestate. *State Bank v. Bliss*, 67 Conn. 317, 35 Atl. 255.

⁵³ *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135.

the title shall revert to him.⁵⁴ The delivery may be made either to the donee or to some one in trust for him,⁵⁵ but it must be such a delivery as would be sufficient to vest the title in the donee.⁵⁶ Delivery to the donor's own agent is not sufficient,⁵⁷ nor is mere intent to deliver, such as verbal directions to the bailee of the property to dispose of it

⁵⁴ 2 Blackstone's Commentaries, p. 514; 2 Kent's Commentaries, p. 444; *Keyl v. Westerhaus*, 42 Mo. App. 49; *Newton v. Snyder*, 44 Ark. 42, 51 Am. Rep. 587; *Ammon v. Martin*, 59 Ark. 191, 26 S. W. 826; *Lowe v. Hart*, 93 Ark. 548, 125 S. W. 1030.

Gift held not conditioned on death and therefor not a gift *causa mortis*. *Robertson v. Robertson*, 147 Ala. 311, 40 South. 104, 3 L. R. A. (N. S.) 774, 10 Ann. Cas. 1051.

⁵⁵ *Nelson v. Sudiek*, 40 Mo. App. 341; *Trorlicht v. Weizenecker*, 1 Mo. App. 482; *Shackleford v. Brown*, 89 Mo. 546, 1 S. W. 390; *Kilby v. Godwin*, 2 Del. Ch. 61; *Robson v. Robson's Adm'r*, 3 Del. Ch. 51.

⁵⁶ *Hamilton v. Clark*, 25 Mo. App. 428; *Dunn v. German American Bank*, 109 Mo. 90, 18 S. W. 1139; *Bromberg v. Bates*, 112 Ala. 363, 20 South. 786; *McHugh v. O'Conner*, 91 Ala. 243, 9 South. 165, *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267.

Gift of passbook or evidence of chose in action is not usually sufficient. *Jones v. Weakley*, 99 Ala. 441, 12 South. 420, 19 L. R. A. 700, 42 Am. St. Rep. 84; *Noble v. Garden*, 146 Cal. 225, 79 Pac. 883, 2 Ann. Cas. 1001; *Basket v. Hassell*, 108 U. S. 267, 2 Sup. Ct. 634, 27 L. Ed. 719. But a valid gift of bank stock may be made if transferred to name of donee. *Hatche v. Buford*, 60 Ark. 169, 29 S. W. 641, 27 L. R. A. 507; *Jones v. Deyer*, 16 Ala. 221.

Deeds and bills of sale executed by one to his heirs in anticipation of death and delivered to one of the grantees to be placed in the chest of the grantor, to be delivered at grantor's death, but subject to his dominion as long as he lives are ineffectual as gifts *causa mortis*. *Ashley v. Ashley*, 93 Ark. 324, 124 S. W. 778.

⁵⁷ *Bieber v. Boeckmann*, 70 Mo. App. 503; *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201.

in a particular way.⁵⁸ Oral instructions to the donor's own agent cannot constitute a gift causa mortis for death terminates the agency.⁵⁹ Delivery during the lifetime of the donor is; in fact, the vital point in this class of cases; for it is that which distinguishes a gift causa mortis from a nuncupative or oral will.⁶⁰

A gift causa mortis differs from a will in that it need not be probated, the title of the donee becoming absolute upon the death of the donor. It is like a will, however, in that it is revocable during the life of the donor,⁶¹ and being a testamentary disposition of property, it is subject to the donor's debts,⁶² and cannot be made for the purpose of depriving the widow of her rights in the personal estate.⁶³

§ 11. Civil or Spanish law of wills

At one time the civil law of Rome as embodied in the law of Spain prevailed over all of the terri-

⁵⁸ *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9.

⁵⁹ *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Sparks v. De La Guerra*, 14 Cal. 108.

⁶⁰ *Tygard v. McComb*, 54 Mo. App. 85; *Smith v. Wiggins*, 3 Stew. (Ala.) 221; *Knight v. Tripp*, 121 Cal. 674, 54 Pac. 267; *Ragan v. Hill*, 72 Ark. 307, 80 S. W. 150.

⁶¹ But it is held that the making of a will by which the testatrix bequeathed all of her property to plaintiff was not a revocation of a gift causa mortis, as such revocation could only be made during the life of the donor, while the will did not take effect until after the death of the testatrix. *Hoehn v. Struttman*, 71 Mo. App. 399.

⁶² *Gaunt v. Tucker's Ex'r*, 18 Ala. 27.

⁶³ *Dunn v. German-American Bank*, 109 Mo. 90, 18 S. W. 1139.

tory embraced in the States of the Union west of the Mississippi River. This body of law was supplanted by the common law of England, by express statutory enactment by each state as it came into Territorial existence or into Statehood. The Spanish law as such has given way entirely to the English, as the Transmississippi region was settled by Americans from the older States east of the Mississippi.⁶⁴ Only in the earlier history of the western States are there any outcroppings of the Spanish law. It will be of interest and possibly of value to refer to these cases: A comparison of the civil and feudal law on the subject of wills by Judge Leonard of Missouri;⁶⁵ Roman law of wills;⁶⁶ Mexican and Spanish law of wills discussed;⁶⁷ Spanish law of execution and probate;⁶⁸ Spanish law of forced and instituted heirs;⁶⁹ Spanish words "Sucesion legitima" mean "issue" and not "lawful heirs."⁷⁰

⁶⁴ Louisiana retains a large measure of the French law.

⁶⁵ *Liggat v. Hart*, 23 Mo. 133.

⁶⁶ *Lewis v. Maris*, 1 Dall. 278-286, 1 L. Ed. 136; *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539.

⁶⁷ *Panaud v. Jones*, 1 Cal. 488; *Scott v. Ward*, 13 Cal. 458; *Castro v. Castro*, 6 Cal. 158; *Tevis v. Pitcher*, 10 Cal. 465.

⁶⁸ *Clark v. Hammerle*, 27 Mo. 55; *Bent v. Thompson*, 5 N. M. 408-418, 23 Pac. 234; *Ortiz v. De Benavides*, 61 Tex. 60.

⁶⁹ *Parker v. Parker*, 10 Tex. 83-90; *Hagerty v. Hagerty's Ex'r*, 12 Tex. 456; *Charle v. Saffold*, 13 Tex. 94-105; *Portis v. Cummings*, 14 Tex. 171; *Crain v. Crain*, 17 Tex. 80-90; *Meegan v. Boyle*, 19 How. 130-149, 15 L. Ed. 577.

⁷⁰ *Rodriguez v. Vivoni*, 201 U. S. 371, 26 Sup. Ct. 475, 50 L. Ed. 792.

CHAPTER II

EXECUTION OF WILLS

- § 12. Purpose of requiring formalities of execution.
- 13. By what law governed.
- 14. Formalities of execution.
- 15. Form of instrument.
- 16. Incorporating other papers.
- 17. Signing.
- 18. Name signed by another.
- 19. Publication.
- 20. Attestation.
- 21. Parties in interest as attesting witnesses.
- 22. Competency of attesting witnesses in general.
- 23. Alteration, corrections and additions.
- 24. Holographic wills.
- 25. Nuncupative wills.

§ 12. Purpose of requiring formalities of execution

It is the policy of the modern English and American law to give to every one of sufficient mental capacity and freedom of choice, the unlimited power to dispose of all his property by will as well as by any other form of alienation.¹ The formalities imposed by statutes upon the execution and attestation of wills are solely with a view to secure and

¹ "It has been the policy of the laws of this State, as well as of the common law wherever it prevails, to permit, to the fullest extent consistent with the public welfare, the testamentary disposition of property." *Bensberg v. Washington University*, 251 Mo. 641-654, 158 S. W. 330.

preserve this right, and not to defeat it. The law seeks to render it as certain as possible that the alleged will is really the will of the testator and not a forged, feigned or fraudulent one. The statutes of all of the states therefore prescribe certain solemnities in the execution of a will to insure its genuineness, and these solemnities must be absolutely observed, otherwise the will is inoperative.² A will cannot take effect until the testator is dead when it is too late to correct mistakes, or to ascertain his real intentions if he has not put them into the form required by law to constitute a valid will. The law considers that if the execution is irregular or informal, it is better to reject the will and admit the claim of the heir than to assume the risk of establishing what may not have been the will of the testator.³

² In re McCabe, 68 Cal. 520, 9 Pac. 554; Johnson's Estate, 57 Cal. 532; Walker's Estate, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104; Seaman's Estate, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726; Estate of Meade, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244; Russell v. Switzer, 63 Ga. 711; Heidenheimer v. Bauman, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29; In re McMillen, 12 N. M. 31, 71 Pac. 1083; Estate of Price, 14 Cal. App. 462, 112 Pac. 482.

³ The legislature has absolute power to prescribe formalities for the execution of a will, a compliance with which is necessary to the exercise of the right. The rule that the intention of the testator must govern, which is applied to the interpretation of wills, does not apply to their execution. Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

The fact that testator was mentally sound and capable does not dispense with necessary formalities of execution, and is not material on that issue. Estate of Price, 14 Cal. App. 462, 112 Pac. 482.

The policy of the Statute of Wills like the Statute of Frauds is that it is better that occasional injustice should be done, in exceptional cases through a failure of legal proof, than that transactions within the statutes should in all cases be left to the uncertainties of parol evidence.⁴

The formalities required, being entirely the creature of statute law, differ in different states.⁵ Most of the American statutes follow in a general way the provisions of the statute 29 Car. II, c. 3. In some of the states this statute has been held to be part of the common law; in others, as in Missouri, it has been substantially re-enacted. In England, the whole subject is regulated by a late statute, 1 Vict., c. 26. This latter statute has also been liberally copied by American legislatures.

⁴ *Clark v. Turner*, 50 Neb. 290-301, 69 N. W. 843, 38 L. R. A. 433.

⁵ In the absence of statute it is not necessary that a will of personal property should be in the handwriting of the testator, or signed by him, or have any subscribing witnesses, provided it was drawn at his request, and according to his dictation, he being of sound and disposing mind. *Darrell v. Brooke*, 2 Hayw. & H. 329-331, Fed. Cas. No. 18,287.

§ 13. By what law governed

We have laid down the cardinal principle that a will of real estate must be executed in accordance with the law of the place where the land lies.⁶ The several states of the Union possess power to regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners.⁷ It does not comport with the dignity or security of an independent state that lands within its borders should be affected by foreign law.⁸ It is competent, however, for a state to provide by statute what effect, if any, it will give to wills of land executed according to the laws of another state or country.

Only a very few states permit lands to pass by a will executed according to a law differing from their own.⁹ Such a statutory rule is regarded as

⁶ *Higgins v. Eaton* (C. C.) 188 Fed. 938; *Varner v. Bevil*, 17 Ala. 286; *Pope v. Pickett*, 51 Ala. 584; *Pennel's Lessee v. Weyant*, 2 Har. (Del.) 501; *Key v. Harlan*, 52 Ga. 476; *Kerr v. White*, 52 Ga. 362; *Castens v. Murray*, 122 Ga. 396, 50 S. E. 131, 2 Ann. Cas. 590; *Croly v. Clark*, 20 Fla. 849; *Frazier v. Boggs*, 37 Fla. 307, 20 South. 245; *Ware v. Wisner* (C. C.) 50 Fed. 310; *Lynch v. Miller*, 54 Iowa, 516, 6 N. W. 740; *Holman v. Hopkins*, 27 Tex. 38; *Crossett Lumber Co. v. Files*, 104 Ark. 600, 149 S. W. 908.

⁷ *U. S. v. Fox*, 94 U. S. 315, 24 L. Ed. 192.

⁸ *Brock v. Frank*, 51 Ala. 85; *Daniel v. Hill*, 52 Ala. 430; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

⁹ From 1807 to 1845 the law of Missouri permitted a will executed in any other state or territory, according to the forms provided by the laws of such state or territory, to pass lands in this state. In

extremely loose and dangerous, as it tends to introduce confusion into land titles, which should be kept as settled and uniform as possible.

If a will is designed to affect land situated in different jurisdictions, it must be executed in accordance with the law of each place; otherwise it will operate only upon the land situated in the place to the law of which it conforms; and the maker will be held to have died intestate in those jurisdictions whose formalities have not been observed.¹⁰

A will of personal property must be executed in accordance with the law of the testator's domicile,¹¹ even though the property be situated in an-

1845, this law was changed, and lands lying in this State could not be devised, unless the will was executed with the formalities required by our law. But such statute is not retroactive. (1851) *Schulenberg v. Campbell*, 14 Mo. 491.

A will executed without this State in conformity to the laws of the testator's domicile will not be a valid will of lands situated in this State unless made in accordance with the requirements of the laws of this State. *Crossett Lbr. Co. v. Files*, 104 Ark. 600, 149 S. W. 908.

¹⁰ *Keith v. Johnson*, 97 Mo. 223, 10 S. W. 597; *Applegate v. Smith*, 31 Mo. 166; *McCormick v. Sullivant*, 10 Wheat. 192, 6 L. Ed. 300; *Armstrong v. Lear*, 8 Pet. 52, 8 L. Ed. 863; *Wilson v. Hall*, 67 Ga. 53.

Where a testator executes two separate and distinct wills, one relating solely to property at his domicile and the other relating solely to property situated in a foreign state or country, both are valid if executed, attested and proved in accordance with the laws of the place where the property disposed of is situated. *Parnell v. Thompson*, 81 Kan. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658.

¹¹ *Watkins v. Eaton* (C. C.) 173 Fed. 133; *Marcy v. Marcy*, 32 Conn. 308; *St. James Church v. Walker*, 1 Del. Ch. 284; *Holman v. Hopkins*, 27 Tex. 38.

other jurisdiction.¹² This is the general rule, but it is quite common for local statutes to recognize the validity of wills executed either according to the law of the testator's domicile, or the law of the state where the property is situate, or where the will was made.¹³

The reason of public policy which requires the title to lands to be controlled by the local law does not apply to personal property. It may happen therefore that a will disposing of both personal and real property may be valid and entitled to probate as to the personal property, but void as to the real estate,¹⁴ or vice versa.¹⁵

As a will goes into effect at the moment of the testator's death and not before, it is this period of the death which fixes the legal status of his property for testamentary purposes. The execution of the will must conform to the statute law as it ex-

¹² *Higgins v. Eaton* (C. C.) 188 Fed. 938; *Grote v. Pace*, 71 Ga. 231.

In general the law of the domicile of the owner governs his capacity to bequeath personal property. But this rule depends on comity, since the state or country of the domicile has no right to extend its laws beyond its borders, and every state as an incident of sovereignty has power to establish and regulate the succession of all property, real and personal, within its territory. *Higgins v. Eaton* (N. Y.) 202 Fed. 75, 122 C. C. A. 1.

¹³ Illinois: *Palmer v. Bradley* (C. C.) 142 Fed. 193.

Kansas: *Gemmell v. Wilson*, 40 Kan. 764, 20 Pac. 458; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372.

¹⁴ *Lake v. Warner*, 34 Conn. 484; *Brown v. Avery*, 63 Fla. 376, 58 South. 34, Ann. Cas. 1914A, 90; *Knight v. Wheedon*, 104 Ga. 309, 30 S. E. 794.

¹⁵ *Holman v. Hopkins*, 27 Tex. 38.

isted at the time of the testator's death and not as it existed at the time of the execution of the will.¹⁶ Similarly in a will of personal property the execution of the will must conform to the law of the domicile the testator held at the time of his death, rather than the domicile at the time of the execution of the will. If a testator execute his will according to the law of his then domicile, and thereafter change his domicile to a place where the laws in regard to execution are different, and die without republishing his will, it may be inoperative.¹⁷

§ 14. Formalities of execution

Most of the American states follow substantially the provisions of the Statute of Frauds, 29 Car. II, c. 3, as to the execution of written wills.¹⁸ The formalities are that all wills, except nuncupative wills when specially permitted by statute, (1) shall be in writing, (2) signed by the testator or some

¹⁶ *Colonna v. Alton*, 23 App. D. C. 296; *Sutton v. Chenault*, 18 Ga. 1; *Hooks v. Stamper*, 18 Ga. 471. Contra: *Lane's Appeal*, 57 Conn 182, 17 Atl. 926, 4 L. R. A. 45, 14 Am. St. Rep. 94.

¹⁷ *Nat v. Coons*, 10 Mo. 543.

¹⁸ Statute of Frauds, 29 Car. II, c. 3, § V: "That from and after the said four and twentieth day of June (1677) all devises and bequests of any lands or tenements, devisable either by force of the Statute of Wills, or by this Statute or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect." *Armstrong v. Armstrong*, 29 Ala. 538; *Bai-*

one in his presence and by his direction, and (3) witnessed by the number of attesting witnesses required by the statute, not less, usually, than two, sometimes three.

It is essential that the instrument be executed *animo testandi*, i. e., with the intention that it, in its then condition, should constitute the last will of the maker. The mere fact that all of the requirements as to execution were observed will not give the will force and effect unless this intention existed. Thus, where by mistake the wrong instrument was duly signed and attested as the will of the testator, it could not be allowed to have that effect. It was so held in a case where two sisters made their wills and each executed by mistake the

ley v. Bailey, 35 Ala. 687; Barnewall v. Murrell, 108 Ala. 366, 18 South. 831.

Requirements of California statute as to execution. Does not copy the English statute. Estate of Walker, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

Wyoming: Neer v. Cowhick, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588.

Oregon Statute of Wills was copied in 1849 from the Missouri statute and the decisions of the Missouri statute are followed. Hardenbergh v. Ray, 151 U. S. 112, 121, 14 Sup. Ct. 305, 38 L. Ed. 93.

The law of wills and probate as existing in Maryland on February 27, 1801, is the law of the District of Columbia, except as since altered by Congress. Campbell v. Porter, 162 U. S. 482, 16 Sup. Ct. 871, 40 L. Ed. 1044.

Statutes of Arkansas on Wills and Descents and Distributions was in force in Creek Nation and Indian Territory in 1905. In re Brown's Estate, 22 Okl. 216, 97 Pac. 613; Taylor v. Hilton, 23 Okl. 354, 100 Pac. 537, 18 Ann. Cas. 385. Act of Congress for execution of Indian wills. Proctor v. Harrison, 34 Okl. 181, 125 Pac. 479.

will intended for the other. Neither will could be established. The paper actually signed was not the will of the testatrix, and the paper intended to be signed was not duly executed.

§ 15. Form of instrument

The will must be in writing, but the law does not attempt to prescribe what form the writing shall assume. It may take any form that the convenience or caprice of the testator may suggest, provided that he intended it to operate only at and after his death, and the instrument be executed with such formalities as local legislation may have imposed. A will need not call itself a will or testament. It may be in the form of a contract or of a deed, but if it is intended to operate after the death of the maker, and it and the property conveyed remain under the control of the maker, it may be held to be a will.¹⁹ The question has often arisen whether a particular instrument was a will or was a deed reserving a life estate to the grantor. The distinction between a deed and a will is clear;

¹⁹ *Miller v. Holt*, 68 Mo. 584; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Id.*, 46 Kan. 73, 26 Pac. 450, 26 Am. St. Rep. 86; *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Jackson v. Rowell*, 87 Ala. 685, 6 South. 95, 4 L. R. A. 637; *Gage v. Gage*, 12 N. H. 371; *Ingram v. Porter*, 4 McCord (S. C.) 198.

An instrument may be a contract in part and testamentary in part. *Powers v. Scharling*, 64 Kan. 339, 67 Pac. 820; *Gomez v. Higgins*, 130 Ala. 493, 30 South. 417; *Kyle v. Perdue*, 87 Ala. 423, 6 South. 296; *Kinnebrew's Dis. v. Kinnebrew's Adm'rs*, 35 Ala. 628; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

the former takes effect from delivery and vests a present legal estate in the grantee; the latter, on the other hand, conveys no present interest, is revocable at the pleasure of the maker, and is not delivered.²⁰

²⁰ Distinction between deed and will. *Bowdoin College v. Merritt* (C. C.) 75 Fed. 480; *Frosch v. Monday*, 34 App. D. C. 338; *Hester v. Young*, 2 Ga. 31; *Givens v. Ott*, 222 Mo. 395-411, 121 S. W. 23; *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753.

Deed and not will. *Love v. Blauw*, 61 Kan. 496, 59 Pac. 1059, 48 L. R. A. 257, 78 Am. St. Rep. 334; *Durand v. Higgins*, 67 Kan. 110, 72 Pac. 567; *Cross v. Benson*, 68 Kan. 497, 75 Pac. 558, 64 L. R. A. 560; *Dozier v. Toalson*, 180 Mo. 546, 79 S. W. 420, 103 Am. St. Rep. 586; *Christ v. Kuehne*, 172 Mo. 118, 72 S. W. 537; *Griswold v. Griswold*, 148 Ala. 239, 42 South. 554, 121 Am. St. Rep. 64; *Harper v. Reaves*, 132 Ala. 625, 32 South. 721; *Adair v. Craig*, 135 Ala. 332, 33 South. 902; *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244; *McCloskey v. Tierney*, 141 Cal. 102, 74 Pac. 699, 99 Am. St. Rep. 33; *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471; *Kenney v. Parks* (Cal.) 54 Pac. 251; *Adams v. Lansing*, 17 Cal. 629; *Hall v. Burkham*, 59 Ala. 349; *Hall's Estate*, 149 Cal. 143, 84 Pac. 839; *Cummings v. Cummings*, 3 Ga. 460; *Jackson v. Culpepper*, 3 Ga. 569; *McGlawen v. McGlawen*, 17 Ga. 234; *Watson v. Watson*, 22 Ga. 460; *Bunn v. Bunn*, 22 Ga. 472; *Meek v. Holton*, 22 Ga. 491; *Daniel v. Veal*, 32 Ga. 589; *Bass v. Bass*, 52 Ga. 531; *Fulcher v. Royal*, 55 Ga. 68.

Deed not will. *Williams v. Tolbert*, 66 Ga. 127; *Youngblood v. Youngblood*, 74 Ga. 614; *White v. Hopkins*, 80 Ga. 154, 4 S. E. 863; *Seals v. Pierce*, 83 Ga. 787, 10 S. E. 589, 20 Am. St. Rep. 344; *Worley v. Daniel*, 90 Ga. 650, 16 S. E. 938; *Kaufman v. Ehrlich*, 94 Ga. 159, 21 S. E. 377; *Goff v. Davenport*, 96 Ga. 423, 23 S. E. 395; *Guthrie v. Guthrie*, 105 Ga. 86, 31 S. E. 40; *Gay v. Gay*, 108 Ga. 739, 32 S. E. 846; *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 378; *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Brice v. Sheffield*, 118 Ga. 128, 44 S. E. 843; *Watkins v. Nugen*, 118 Ga. 372, 45 S. E. 262; *Griffith v. Douglass*, 120 Ga. 582, 48 S. E. 129; *Jones v. Lingo*, 120 Ga. 693, 48 S. E. 190; *Sharpe v. Mathews*, 123 Ga. 794, 51 S. E. 706; *Hamilton v. Cargile*, 127 Ga. 762, 56 S. E. 1022; *Kytte v. Kytte*, 128 Ga. 387, 57 S. E. 748; *Isler v. Griffin*, 134 Ga. 192, 67 S. E. 854; *Hughes v.*

An instrument may be upheld as a deed that reserves the entire use and enjoyment of the property to the grantor during life and inures to the

Hughes, 135 Ga. 468, 69 S. E. 818; *Rogers v. Kennard*, 54 Tex. 30; *Chrisman v. Wyatt*, 7 Tex. Civ. App. 40, 26 S. W. 759; *McLain v. Garrison*, 39 Tex. Civ. App. 431, 88 S. W. 484, 89 S. W. 284; *Freeman v. Jones*, 43 Tex. Civ. App. 332, 94 S. W. 1072; *Bevins v. Phillips*, 6 Kan. App. 324, 51 Pac. 59; *Millican v. Millican*, 24 Tex. 426; *Miles v. Miles*, 78 Kan. 382, 96 Pac. 481; *Harrod v. McComas*, 78 Kan. 407, 96 Pac. 484; *Brady v. Fuller*, 78 Kan. 448, 96 Pac. 854; *Fiscus v. Wilson*, 74 Neb. 444, 104 N. W. 856; *Pentico v. Hays*, 75 Kan. 76, 88 Pac. 738, 9 L. R. A. (N. S.) 224; *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690, 9 L. R. A. (N. S.) 317, 12 Ann. Cas. 677.

Promissory note and not will. *Maze v. Baird*, 89 Mo. App. 348; *Bristol v. Warner*, 19 Conn. 7; *Kirkpatrick v. Kirkpatrick's Ex'r*, 6 Houst. (Del.) 569; *McCord v. Thompson*, 131 Ga. 126, 61 S. E. 1121.

Contract and not will. *Bolman v. Overall*, 80 Ala. 451, 2 South. 624, 60 Am. Rep. 107; *Refeld v. Bellette*, 14 Ark. 148; *Pryor v. Ryburn*, 16 Ark. 671; *Williams v. Noland*, 10 Tex. Civ. App. 629, 32 S. W. 328.

Antenuptial contract not testamentary. *Huguley v. Lanier*, 86 Ga. 636, 12 S. E. 922, 22 Am. St. Rep. 487.

Letter held not to be of a testamentary character. *Estate of Meade*, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244; *Estate of Richardson*, 94 Cal. 63, 29 Pac. 484, 15 L. R. A. 635; *Scott's Estate*, 128 Cal. 57, 60 Pac. 527; *In re Jensen's Estate*, 37 Utah, 428, 108 Pac. 927.

Will and not deed. *Mosser v. Mosser*, 32 Ala. 551; *Walker v. Jones*, 23 Ala. 448; *Jordan v. Jordan*, 65 Ala. 301; *Crocker v. Smith*, 94 Ala. 295, 10 South. 258, 16 L. R. A. 576; *Moore v. Campbell*, 102 Ala. 445, 14 South. 780; *Sharp v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28; *Ziegler v. Carter*, 94 Ala. 291, 10 South. 260; *Dunn v. Bank of Mobile*, 2 Ala. 152; *Shepherd v. Nabors*, 6 Ala. 631; *Gillham v. Mustin*, 42 Ala. 365; *McGuire v. Bank of Mobile*, 42 Ala. 589; *Thompson v. Johnson*, 19 Ala. 59; *Trawick v. Davis*, 85 Ala. 342, 5 South. 83; *Dudley v. Mallery*, 4 Ga. 52; *Cravy v. Rawlins*, 8 Ga. 450; *Symmes v. Arnold*, 10 Ga. 506; *Wellborn v. Weaver*, 17 Ga. 267, 63 Am. Dec. 235; *Hall v. Bragg*, 28 Ga. 330; *Brewer v. Baxter*, 41 Ga. 212, 5 Am. Rep. 530; *Bright v. Adams*, 51 Ga. 239;

benefit of the grantee only at the death of the grantor.²¹

When there is a general reservation or something like a general reservation of the maker's right to deal with the property as his own, notwithstanding the instrument, and no conclusive

Nichols v. Chandler, 55 Ga. 369; *Arnold v. Arnold*, 62 Ga. 627; *Sperber v. Balster*, 66 Ga. 317; *Blackstock v. Mitchell*, 67 Ga. 768; *Johnson v. Sirmans*, 69 Ga. 617; *Heard v. Palmer*, 72 Ga. 178; *Ward v. Campbell*, 73 Ga. 97; *Donald v. Nesbit*, 89 Ga. 290, 15 S. E. 367; *Barnes v. Stephens*, 107 Ga. 436, 33 S. E. 399; *Dye v. Dye*, 108 Ga. 741, 33 S. E. 848; *Williams v. Claunch*, 44 Tex. Civ. App. 25, 97 S. W. 111; *Pinkham v. Pinkham*, 55 Neb. 729, 76 N. W. 411; *Carlton v. Cameron*, 54 Tex. 72, 38 Am. Rep. 620.

Will and not a promissory note. *Johnson v. Yancey*, 20 Ga. 707, 65 Am. Dec. 646.

Contract held testamentary and vesting no present interest. *Glover v. Fillmore*, 88 Kan. 545, 129 Pac. 144.

Masonic will. *Whitney v. Hanington*, 36 Colo. 407, 85 Pac. 84.

Authorities collected as to when an instrument is a deed and when a will. *Moore v. Campbell*, 102 Ala. 452, 14 South. 780; *Gomez v. Higgins*, 130 Ala. 493, 30 South. 417; *Whitten v. McFaul*, 122 Ala. 623, 26 South. 131; *Abney v. Moore*, 106 Ala. 134, 18 South. 60.

²¹ *Griffith v. Marsh*, 86 Ala. 302, 5 South. 569; *Sharp v. Hall*, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28; *Adams v. Broughton*, 13 Ala. 731; *Elmore v. Mustin*, 28 Ala. 309; *Golding v. Golding's Adm'r*, 24 Ala. 122; *Griffith v. Marsh*, 86 Ala. 302, 5 South. 569; *Galloway v. Devaney*, 21 Ark. 526; *Bunch v. Nicks*, 50 Ark. 367, 7 S. W. 563; *Parker v. Walls*, 75 Ark. 86, 86 S. W. 849.

In a deed a present estate or interest is passed, while in an instrument testamentary in character no part of the title passes until the death of the grantor. When the grantor's intention appears to be that no estate or interest is to pass until his death, then the instrument is testamentary, and if not executed in the form and manner required of a will it is of no force or effect for any purpose.

Instrument held to be a deed creating an express trust with power of revocation and not a will. *Sims v. Brown*, 252 Mo. 58, 158 S. W. 624.

effect can be given to it until the death of the maker, the law regards the instrument as testamentary.²²

The courts in applying these principles attach considerable weight to the fact of delivery or non-delivery of the instrument to the grantee, as well as to the wording of the instrument itself. It may therefore happen that an instrument which for want of delivery cannot operate as a deed, may also for failure to comply with the statutory forms of execution be invalid as a will.²³ In case of doubt whether an instrument is a deed or will it will be held to be whichever will make it legal and effective.²⁴ If it can operate as a deed the presumption is that it is a deed rather than a will in favor of the early vesting of estates.²⁵

²² Gillham v. Mustin, 42 Ala. 365. Deeds testamentary in character should be probated, but this objection may be waived by an attack on other grounds. Crain v. Crain, 21 Tex. 790.

²³ Murphy v. Gabbert, 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733; Withinton v. Withinton, 7 Mo. 589; Griffin v. McIntosh, 176 Mo. 392, 75 S. W. 677; Skerrett's Estate, 67 Cal. 585, 8 Pac. 181; Demartini v. Allegretti, 146 Cal. 214, 79 Pac. 871; Young's Estate, 123 Cal. 337, 55 Pac. 1011.

A provision in a will for the future delivery of deeds is ineffective. Such delivery, if performed as directed, would amount in law to nothing. Estate of Young, 123 Cal. 337, 55 Pac. 1011.

A deed in the nature of a testamentary disposition, placed in escrow by the maker to be delivered after his death, held good in Connecticut by local custom. Bryan v. Bradley, 16 Conn. 474.

²⁴ Dismukes v. Parrott, 56 Ga. 513.

²⁵ Owen v. Smith, 91 Ga. 564, 18 S. E. 527; Westmoreland v. Westmoreland, 92 Ga. 233, 17 S. E. 1033.

It may be written in pencil,²⁶ ink, or on the typewriter; although as to pencil and typewritten wills, while no objection to their legality exists, their use is condemned as a matter of prudence, on account of the ease with which they may be erased or altered. They are liable also to fade in course of time. But wills written with a metal pen and the common nut-gall ink cannot be erased or altered without the traces of the change being apparent under the microscope.

Wills may be written in any language²⁷ or even in shorthand. They may be wholly written or partly written on a printed or engraved blank. They may also be in any form of words or expressions that will convey with reasonable clearness the testator's meaning. Even abbreviations will not affect the legality of the will, if the sense in which the testator used them can be arrived at.

Bad grammer or spelling does not invalidate a will if the meaning is clear.²⁸

²⁶ *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268.

²⁷ What is the correct English translation of a will written in the Hawaiian language is a pure question of fact, and in this case this court follows its usual course in regard to the finding of fact of the lower court and adopts its finding. *Gray v. Noholoa*, 214 U. S. 108, 29 Sup. Ct. 571, 53 L. Ed. 931, 18 Hawaii, 265, affirmed.

²⁸ *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279.

Irrelevant recitals do not vitiate a will otherwise good. *Conoly v. Gayle*, 61 Ala. 116.

Instrument which merely nominates an executor without making any disposition of property is a will. *Hickman's Estate*, 101 Cal. 609, 36 Pac. 118.

The real question is said by the courts to be, was the instrument executed "animo testandi," i. e., with the intention that it should operate as a will.²⁹ From the fact that the will is written in lead pencil, or from the use of abbreviations, the presumption sometimes arises that the instrument was intended merely as a draft or memorandum notes of a will, and not as a final deliberate testamentary instrument.³⁰

An unfinished paper is *prima facie* not a will.³¹ If it appears that the testator intended to do some further act before finally adopting the instrument

²⁹ *Brown v. Avery*, 63 Fla. 376, 58 South. 34, Ann. Cas. 1914A, 90; *Meade's Estate*, 118 Cal. 428, 50 Pac. 541, 62 Am. St. Rep. 244.

The law does not require that a will shall assume any particular form or be couched in language technically appropriate to its testamentary character. However irregular it may be in form or inartificial in expression, it is sufficient if it discloses the intention of the maker respecting the disposition of his property, and that it was intended to take effect after his death, and is in its nature ambulatory and revocable during his life. *Ferguson v. Ferguson*, 27 Tex. 339.

³⁰ *Ex parte Edward Henry*, 24 Ala. 638; *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Boling's Heirs v. Boling's Ex'rs*, 22 Ala. 826.

³¹ *In re McIntire*, 2 Hayw. & H. 339, Fed. Cas. No. 8,823a; *Power v. Davis*, 3 McArthur (10 D. C.) 153; *Cruit v. Owen*, 21 App. D. C. 378-392; *Frierson v. Beall*, 7 Ga. 438; *Ferguson v. Ferguson*, 27 Tex. 339.

That the amount of a bequest is left blank is no evidence that will is incomplete. *In re Flint*, 100 Cal. 391, 34 Pac. 863; *Kultz v. Jaeger*, 29 App. D. C. 300.

Inference to be drawn that an incomplete paper was not intended as a will is slight, and may be rebutted. *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753.

as his will, it cannot operate unless that final act has been done.³² Thus where a testator made a draft or memorandum notes of a will and handed them to his attorney to be copied, or preserved them among his valuable papers, such instruments cannot operate as his will even though they may conform to the statutes; because it is clear that they are not his final and deliberate act. So, where a testator executed his will in due form, but mentioned in it certain other papers, schedules or lists which he intended to attach to and make part of it, the will is not complete or valid in the absence of such supplemental papers.

§ 16. Incorporating other papers

It is proper for a testator to refer to other written instruments and make them part of his will, whether they be attached or not. Such instruments will be admitted to probate as part of the will, but subject to two important rules:

First: The paper intended to be incorporated must be clearly identified.³³ The clearest identification, of course, is that it is attached to the will; but the physical attachment is not essential.

³² *Mealing v. Pace*, 14 Ga. 596.

But held that the absence of a seal spoken of in the testatum clause did not show that the testator did not consider the will finally executed. *Ketchum v. Stearns*, 8 Mo. App. 66, affirmed 76 Mo. 396.

³³ *Matthews v. McDade*, 72 Ala. 377; *Jordan v. Jordan*, 65 Ala. 301; *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779; *Estate of Young*, 123 Cal. 337, 55 Pac. 1011; *Hatheway v. Smith*, 79 Conn. 506, 65

Papers incorporated in a will must be clearly described, so that they may be identified from the words of the will itself. If parol evidence were necessary to identify them the will would not be wholly in writing as the law requires.³⁴

Second: The paper must be in existence at the time of the execution of the will.³⁵ For if it is not then in existence, but is made afterward it would amount to an unattested addition or codicil to the will; and the safeguard of attestation which the law throws around a will would be defeated.³⁶

The document referred to in the will, if in existence, need not be present or attested by the witnesses.³⁷

Although an unattested will is inoperative, such a will may be given effect by being referred to and identified in a properly attested codicil. This is

Atl. 1058, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99; *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96.

What is not a sufficient reference to make paper part of will. *Myer's Estate*, Myr. Prob. (Cal.) 205; *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29.

³⁴ *Estate of Young*, 123 Cal. 337, 55 Pac. 1011.

³⁵ *In re Estate of Hopper*, 90 Neb. 622, 134 N. W. 237.

³⁶ *Newton v. Seamans' Friend Society*, 130 Mass. 91, 39 Am. Rep. 433; *Appeal of Wm. J. Bryan*, 77 Conn. 240, 58 Atl. 748, 68 L. R. A. 353, 107 Am. St. Rep. 34, 1 Ann. Cas. 393; *In re Shillaher*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; *Jones v. Habersham*, 63 Ga. 146; *Phelps v. Robbins*, 40 Conn. 250-271; *Vestry v. Bostwick*, 8 App. D. C. 452.

³⁷ *Willey's Estate*, 128 Cal. 1, 60 Pac. 471; *Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1082.

under the rule that a testamentary instrument duly executed may incorporate into itself other existing papers.³⁸

§ 17. Signing

The execution of a will really consists of three parts; the signing, the publication and the attestation. At the common law there was no requirement that a will of personal property be signed,³⁹ and even the statute of wills which conferred the power to will freehold lands made no reference to a signature. The execution of wills was very informal until the passage of the Statute of Frauds, 29 Car. II, c. 3, which required wills to be signed and attested.⁴⁰

The signature should properly occur at the foot or end of the will like the signature to any other document. If it be so placed, it is more clearly to be inferred that it was intended as an authentica-

³⁸ *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Estate of Plumel*, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100; *Burge v. Hamilton*, 72 Ga. 568.

The execution of a codicil has the effect to republish the whole will, as modified by the codicil, as of the date of the codicil, and its effect is not limited to a republication of the only clause which the codicil purports to modify. *Ladd's Estate*, 94 Cal. 670, 30 Pac. 99.

Will and codicil may be executed as one instrument. *Fowler v. Stagner*, 55 Tex. 393.

³⁹ *Frierson v. Beall*, 7 Ga. 438; 2 Blackstone Com. 501; *Cruit v. Owen*, 21 App. D. C. 378-392.

⁴⁰ Instrument held not will, because not signed and attested by testator, but a written memorandum of testator's wishes, signed by another person. *Ostorne v. Atkinson*, 77 Kan. 435, 94 Pac. 796.

tion of the will as a whole.⁴¹ Ordinarily, no terms can be read as part of the will which are written after the signature.⁴² The testator's signature should precede the attestation clause, for such clause is not strictly part of the will, but the signature is not invalidated by being placed below the attestation clause.⁴³ The matter is now regulated in England by the Act of Vict. which requires a will to be signed at the foot or end thereof, and this requirement is copied in some of our American statutes.⁴⁴

A will may consist of more than one sheet of paper if the parts are connected by their internal sense.⁴⁵ Where a will consists of more than one sheet of paper, it is considered the better practice to have the testator write his name or his initials on each sheet of the manuscript for identification.⁴⁶ This is in addition to the regular signing at the end of the will.

⁴¹ Signature not so placed as to authenticate will. *Estate of Seaman*, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726.

⁴² A will signed above the clause appointing executor is valid as to all that precedes the signature. *Estate of McCullough*, Myr. Prob. (Cal.) 76; *Owens v. Bennett*, 5 Har. (Del.) 367.

⁴³ *Huff v. Huff*, 41 Ga. 696; *Underwood v. Thurman*, 111 Ga. 325-334, 36 S. E. 788.

⁴⁴ *Blake's Estate*, 136 Cal. 306, 68 Pac. 827, 89 Am. St. Rep. 135.

⁴⁵ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *Murphy's Estate*, 104 Cal. 554, 38 Pac. 543; *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214.

⁴⁶ *Jones v. Habersham*, 63 Ga. 146-150.

The signature of the testator may be a mere mark or symbol, or even a fictitious name; but it must be something which is placed upon the instrument as a signature and intended to operate as such.⁴⁷ It has been held that a signing by a mark is sufficient even though the testator was able to write.⁴⁸

§ 18. Name signed by another

The testator's name may be written either by himself or by some other person by his direction and in his presence.⁴⁹ When the name is written by another than the testator, two things are essential—that the signing be done by his direction and in his presence.⁵⁰ Mere knowledge by the testator

⁴⁷ *Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *Mosser v. Mosser*, 32 Ala. 551; *Bailey v. Bailey*, 35 Ala. 690; *Schieffelin v. Schieffelin*, 127 Ala. 36, 28 South. 687; *In re Will of Cornelius*, 14 Ark. 675; *Guthrie v. Price*, 23 Ark. 396; *Lipphard v. Humphrey*, 209 U. S. 264, 28 Sup. Ct. 561, 52 L. Ed. 783, 14 Ann. Cas. 872; *Stephens v. Stephens*, 129 Mo. 422, 31 S. W. 792, 50 Am. St. Rep. 454; *Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233; *Smith v. Dolby*, 4 Har. (Del.) 350.

⁴⁸ *Will of Guilfoyle*, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370; *St. Louis Hospital Ass'n v. Williams*, 19 Mo. 609; *Thompson v. Thompson*, 49 Neb. 157, 68 N. W. 372; *Vernon v. Kirk*, 30 Pa. St. 222; *Will of Jenkins*, 43 Wis. 610; *Nickerson v. Buck*, 12 Cush. (Mass.) 332.

⁴⁹ *Riley v. Riley*, 36 Ala. 496; *Abraham v. Wilkins*, 17 Ark. 292; *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83; *Elliott v. Welby*, 13 Mo. App. 19; *Moore v. McNulty*, 164 Mo. 111, 64 S. W. 159; *Estate of Dombrowski*, 163 Cal. 290, 125 Pac. 233; *Rash v. Purnel*, 2 Har. (Del.) 448-458; *Robertson v. Hill*, 127 Ga. 175, 56 S. E. 289; *In re Estate of Powers*, 79 Neb. 680, 113 N. W. 198.

⁵⁰ *McCoy v. Conrad*, 64 Neb. 150; 89 N. W. 665; *Waite v. Frisbie*,

that his name is being signed by another has been said to be insufficient.⁵¹ But proof that the testator presented the instrument to the attesting witnesses as his will with his name signed thereto by another, is some evidence that such signing was done in his presence and by his direction.

An illiterate man is not precluded from making a will; neither, under the modern law, is a blind man or a mute. Such misfortunes as these call for additional caution on the part of a legal adviser if he be in charge of the execution of a will. The question as to what may be said to be in the presence of a blind man, or what will constitute directions or request by a mute has received a liberal and reasonable construction by the courts, where no suspicion of imposition appears. Physical weakness may often render a dying man unable to sign his name, and in such case his name may be

45 Minn. 361, 47 N. W. 1069; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Snyder v. Bull*, 17 Pa. 60.

Sufficient evidence of request for signing by another. *Elliott v. Elliott*, 3 Neb. (Unof.) 832, 92 N. W. 1006; *Isaac v. Halderman*, 76 Neb. 823, 107 N. W. 1016.

⁵¹ *Murry v. Hennessy*, 48 Neb. 608, 67 N. W. 470.

Under the Missouri statute existing in 1851 if the name of the testator was signed by another, the person signing must subscribe his own name as a witness, and state that he subscribed the testator's name at his request. *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701; (1858) *Simpson v. Simpson*, 27 Mo. 288; (1855) *St. L. Hos. Ass'n v. Wegman*, 21 Mo. 17; (1855) *Northcutt v. Northcutt*, 20 Mo. 266; (1854) *St. Louis H. Ass'n v. Williams*, 19 Mo. 609; (1851) *McGee v. Porter*, 14 Mo. 611, 55 Am. Dec. 129.

signed by another, or his hand may be guided in forming the letters.⁵²

§ 19. Publication

The next step in the due execution of a will, after the drafting and signing, is the publication. The term "publication" used in this connection means nothing more than that the testator should make known by some word or act his intention to adopt the instrument as his will. Publication is thus the act which precedes or accompanies the attestation by the witnesses. It is not, in general, necessary for the subscribing witnesses to see the testator sign the will;⁵³ but if they do not see him sign, they should at least see his signature, and he should acknowledge to them that he has affixed his signature to the paper as his will.⁵⁴

There would undoubtedly have been a formal execution of the will in compliance with the statutes if the witnesses had, at the time, seen the signature of the testator to the will. Subscribing witnesses to a will are required by law for the purpose of attesting and identifying the signature of the testator, and that they cannot do unless at the time of the attestation they see it.⁵⁵

⁵² *Vines v. Clingfost*, 21 Ark. 309; *In re Guilfoyle*, 96 Cal. 598, 31 Pac. 553, 22 L. R. A. 370.

⁵³ *Crittenden's Estate*, Myr. Prob. (Cal.) 50; *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702.

⁵⁴ *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; *Rash v. Purnel*, 2 Har. (Del.) 448-458; *Russell v. Russell's Ex'rs*, 3 Houst. (Del.) 103; *In re Porter*, 20 D. C. 493; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675.

⁵⁵ *Mackey's Will*, 110 N. Y. 611, 18 N. E. 433, 1 L. R. A. 491, 6 Am. St. Rep. 409.

In that case the testator had handed his will to the subscribing witnesses folded in such a manner that his signature was not visible, and they never in fact saw his signature to the instrument. It was held that the will was not duly executed. In some states the statute requires that the testator should call the attention of the attesting witnesses to the fact that the instrument is his will. Even where this is not required in terms by the statute, it should be done,⁵⁶ although it is held in some states that it is not necessary the witness should know that the paper is a will, provided he can identify it as the paper to which he put his name.⁵⁷

The declaration that the instrument is his will, and the request to witness it need not be verbal; an act or sign will suffice.⁵⁸ While it is ordinarily

⁵⁶ Sufficient publication. *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Johnson's Estate*, 57 Cal. 529; *Mullin's Estate*, 110 Cal. 252, 42 Pac. 645; *Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857; *Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641; *In re Estate of Ayers*, 84 Neb. 16, 120 N. W. 491.

Not sufficient publication. *Taney's Estate*, Myr. Prob. (Cal.) 210; *Fusilier's Estate*, Myr. Prob. (Cal.) 40.

⁵⁷ *Canada's Appeal*, 47 Conn. 450; *Notes v. Doyle*, 32 App. D. C. 413; *In re Porter*, 20 D. C. 493.

Nebraska statute does not require that witnesses subscribe at request of testator. *Thompson v. Thompson*, 49 Neb. 157-163, 68 N. W. 372.

⁵⁸ *Rogers v. Diamond*, 13 Ark. 474; *McDaniel v. Crosby*, 19 Ark. 533; *Crittenden's Estate*, Myr. Prob. (Cal.) 50; *Martin v. Bowdern*, 158 Mo. 389, 59 S. W. 227; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Hughes v. Rader*, 183 Mo. 630, 82 S. W. 32; *Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015; *Huff v. Huff*, 41 Ga. 696.

required that the witnesses know that the instrument is a will, it is not necessary or proper that they should know its contents,⁵⁹ except in cases where imposition is likely to be practiced on the testator. Where full opportunity exists, knowledge by the testator of the contents of the will is presumed.⁶⁰

But if the testator be illiterate or blind, or if he must convey his wishes to the scrivener through an interpreter, further evidence may be necessary to show that he fully understood the contents.⁶¹

⁵⁹ *Notes v. Doyle*, 32 App. D. C. 413.

⁶⁰ *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216; *Gaither v. Gaither*, 20 Ga. 709; *Smith v. Dolby*, 4 Har. (Del.) 350; *Hess' Appeal*, 43 Pa. 73-78, 82 Am. Dec. 551; *King v. Kinsey*, 74 N. C. 261; *Yoe v. McCord*, 74 Ill. 33; *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334; *Beall v. Mann*, 5 Ga. 456; *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870.

It is not necessary to show that testator understood all the technical terms and legal phraseology of the will. *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

Usual presumption that testator knew contents of instrument he signed, in absence of any lack of capacity, is not overcome by showing that one who assisted in its preparation was beneficiary under the will. *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

⁶¹ *Miltenberger v. Miltenberger*, 78 Mo. 27, affirming s. c., 8 Mo. App. 306; *Beyer v. Hermann*, 173 Mo. 295, 73 S. W. 164; *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664; *Ortt v. Leonhardt*, 102 Mo. App. 38, 74 S. W. 423; *Potts v. House*, 6 Ga. 324-346, 50 Am. Dec. 329; *Barker v. Bell*, 49 Ala. 284; *Leverett's Heirs v. Carlisle*, 19 Ala. 80; *Avaro v. Avaro*, 235 Mo. 424, 138 S. W. 500; *Carlson v. Lofgran*, 250 Mo. 527, 157 S. W. 555.

If testator had no knowledge of contents of will, it will be set aside. *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289.

But a will was sustained although testatrix could not read, signed with a mark, and there was no affirmative evidence that she knew

It is not imperative that the will be read over to the testator in the presence of the witnesses, but it is safe practice to do so.⁶² In some states, by statute, if the scrivener of the will or his immediate relatives are beneficiaries under the will greater proof is required to show knowledge of the contents by the testator.⁶³

§ 20. Attestation

After the publication, or simultaneously with it, the will should be attested and subscribed by the statutory number of witnesses. In most of the states the statutes require that every will shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator.⁶⁴

contents of will. *Lipphard v. Humphrey*, 209 U. S. 264, 28 Sup. Ct. 561, 52 L. Ed. 783, 14 Ann. Cas. 872. See, also, *Latour's Estate*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441.

⁶² *Clifton v. Murray*, 7 Ga. 564, 50 Am. Dec. 411; *Meeks v. Lofley*, 99 Ga. 170, 25 S. E. 92; *Lipphard v. Humphrey*, 28 App. D. C. 355.

⁶³ *Hughes v. Meredith*, 24 Ga. 325, 71 Am. Dec. 127; *Carrie v. Cummings*, 26 Ga. 690; *Martin v. Mitchell*, 28 Ga. 382; *Adair v. Adair*, 30 Ga. 102; *Harris v. Harris*, 53 Ga. 678-683; *Vickery v. Hobbs*, 21 Tex. 570, 73 Am. Dec. 238; *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870; *Harrison v. Rowan*, 3 Wash. C. C. 580, Fed. Cas. No. 6,141; *Wheeler v. Alderson*, 3 Hogg. 574; *Billinghurst v. Vickers*, 1 Phillimore, 187-199; *Paske v. Ollat*, 2 Phillimore, 323.

⁶⁴ *Elliott v. Welby*, 13 Mo. App. 19; *Poore v. Poore*, 55 Kan. 687, 41 Pac. 973; *Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071, 70 Pac. 586; *Perea v. Barela*, 5 N. M. 458, 23 Pac. 766.

In the absence of statutory provisions a will of personalty is good without the attestation of subscribing witnesses. *McGrews v. McGrews*, 1 Stew. & P. (Ala.) 30; *Hilliard v. Binford*, 10 Ala. 977;

The word "attest" means something more than the word "subscribe."⁶⁵ It means that the witness must be prepared to testify to the valid execution of the instrument as a will. Such a valid execution includes the signing, the publication, the identity of the instrument and the mental capacity and freedom of choice of the testator. All these, therefore, should be in the contemplation of the witnesses at the time they are called upon to witness the will.⁶⁶

Witnesses should subscribe their names after the will is signed by the testator, there being nothing to attest until his signature has been affixed.⁶⁷ But the witnesses may sign before the testator if the acts are practically contemporaneous.⁶⁸

In some states it is made necessary by statute that the witnesses sign in the presence of each oth-

Couch v. Couch, 7 Ala. 519, 42 Am. Dec. 602; *Ex parte Henry*, 24 Ala. 638.

Such a will may be good as to the personalty and void as to realty.

Instrument held to be testamentary in character and void as not duly attested. *Cunningham v. Mills*, 102 Ga. 584, 30 S. E. 429.

⁶⁵ *International Tr. Co. v. Anthony*, 45 Colo. 474, 101 Pac. 781, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087.

⁶⁶ *Crowson v. Crowson*, 172 Mo. 700, 72 S. W. 1065; *Withinton v. Withinton*, 7 Mo. 589.

Parol evidence of execution of will. *In re Estate of Hopper*, 90 Neb. 622, 134 N. W. 237.

⁶⁷ *Brooks v. Woodson*, 87 Ga. 379, 13 S. E. 712, 14 L. R. A. 160; *Duffie v. Corridon*, 40 Ga. 122; *Lane v. Lane*, 125 Ga. 386, 54 S. E. 90, 114 Am. St. Rep. 207, 5 Ann. Cas. 462.

⁶⁸ *O'Brien v. Galagher*, 25 Conn. 231; *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216.

er, as well as of the testator;⁶⁹ and wherever this is the case, such statutory requirement must, of course, be complied with. There seems to be no logical reason for this, as the theory of the law is that the testator is the one to be assured that the paper attested by the witnesses is the identical paper executed by him, and this is accomplished if they all sign in his presence.⁷⁰

It is not necessary that the attesting witnesses should see the testator sign: an acknowledgment of his signature is sufficient.⁷¹

The rule on this important point is thus laid down in a Missouri case:

It is not necessary for the testator to sign his name in the actual presence of either of the witnesses, provided they sign in his presence, and at the time they sign he acknowledges, or makes known to them by word, act or sign, that he executed the writing as his will.⁷²

⁶⁹ *Ward v. Co. Com'rs*, 12 Okl. 267, 280, 70 Pac. 378.

⁷⁰ *Hoffman v. Hoffman*, 26 Ala. 535; *Snider v. Burks*, 84 Ala. 53, 4 South. 225; *Moore v. Spier*, 80 Ala. 129; *In re Will of Cornelius*, 14 Ark. 675; *Abraham v. Wilkins*, 17 Ark. 292; *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664; *Cravens v. Faulconer*, 28 Mo. 19; *Smith v. Holden*, 58 Kan. 535, 543, 50 Pac. 447; *Woodecock v. McDonald*, 30 Ala. 411; *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *In re Porter*, 20 D. C. 493; *Notes v. Doyle*, 32 App. D. C. 413; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675.

Insufficient execution. *Estate of Walker*, 110 Cal. 387, 42 Pac. 815, 30 L. R. A. 460, 52 Am. St. Rep. 104.

⁷¹ *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; *In re Porter*, 20 D. C. 493; *Thompson v. Davitte*, 59 Ga. 472; *Notes v. Doyle*, 32 App. D. C. 413.

⁷² *Grimm v. Tittman*, 113 Mo. 57, 20 S. W. 664; *Cravens v. Faulconer*, 28 Mo. 19; *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701; *Moore v. McNulty*, 164 Mo. 111, 64 S. W. 159.

In the presence of the testator means, generally, in his sight: not necessarily in the same room with him, but within the range of his vision, and so close as to exclude the opportunity for fraud or substitution of papers. It is not necessary that the testator should actually see the witnesses sign; provided the act is done in such proximity that he could have seen them if he had chosen to look, and had had the use of his vision. If the testator is blind, or is suffering from an injury which prevents him from turning his head, or is too ill to move or look around, and the signing by the witnesses is done in such close proximity that if he had had the ordinary powers of vision and freedom of motion he might see them, the attestation is good, even though he did not in fact see them.⁷³

As said in a Michigan case:

In the definition of the phrase "In the presence of" due regard must be had to the circumstances of each particular case, as it is well settled by all the authorities that the statute does not require absolutely that the witnessing must be done in the actual sight of the testator, nor yet within the same room with him. If they sign within his hearing, knowledge

⁷³ *Hill v. Barge*, 12 Ala. 687; *Pool's Heirs v. Pool's Ex'rs*, 35 Ala. 12; *Spoonemore v. Cables*, 66 Mo. 579; *Robinson v. King*, 6 Ga. 539; *Reed v. Roberts*, 26 Ga. 294, 71 Am. Dec. 210; *Lamb v. Girtman*, 26 Ga. 625; *Hamlin v. Fletcher*, 64 Ga. 549.

Not in presence of testator. *International Tr. Co. v. Anthony*, 45 Colo. 474, 101 Pac. 781, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087; *Lamb v. Girtman*, 33 Ga. 289.

If testator is in a stupor when witnesses attest will, he may be bodily but not mentally present. *Ragan v. Ragan*, 33 Ga. Supp. 106, 119.

and understanding, and so near as not to be substantially away from him, they are considered to be in his presence.⁷⁴

An attestation clause is usually annexed to a will just above the signatures of the attesting witnesses; and in such attestation clause is recited the compliance with all the statutory requirements. This attestation clause is not strictly necessary, as it has been held that the simple signatures of two or more competent witnesses is sufficient without an attestation clause.⁷⁵ But it is always desirable to have such attestation clause, as a contemporaneous record of the facts. A good form is as follows:

Signed and attested by us as witnesses in the presence of the above named testator John Doe; the said John Doe declaring this instrument to be his last will and testament and the signature thereto attached to be his signature, this _____ day of _____.

A presumption of the due execution of a will arises from the presence of an attestation clause

⁷⁴ *Cook v. Winchester*, 81 Mich. 581, 46 N. W. 106, 8 L. R. A. 822.

⁷⁵ *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; *Berberet v. Berberet*, 131 Mo. 399, 33 S. W. 61, 52 Am. St. Rep. 634; *Murphy v. Murphy*, 24 Mo. 526; *Estate of Kent*, 161 Cal. 142, 118 Pac. 523; *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 397; *Kelly v. Moore*, 22 App. D. C. 9; *Deupree v. Deupree*, 45 Ga. 415; *Ward v. Co. Com'rs*, 12 Okl. 267, 280, 70 Pac. 378; *Avaro v. Avaro*, 235 Mo. 424, 138 S. W. 500; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306; *Monroe v. Huddart*, 79 Neb. 569, 113 N. W. 149, 14 L. R. A. (N. S.) 259; *Ferris v. Neville*, 127 Mich. 444, 86 N. W. 960, 54 L. R. A. 464, 89 Am. St. Rep. 480; *Lautenshlager v. Lautenshlager*, 80 Mich. 285, 45 N. W. 147.

which recites the facts necessary to the valid execution of the will.⁷⁶

The omission to state in the attestation clause that the witnesses signed at the request of the testator is immaterial.⁷⁷

While it is perfectly valid for the name of an attesting witness to be signed by another, or for such witness to make his mark, yet for plain reasons this is a highly inconvenient and dangerous form of attestation. Writing is now so common that witnesses should always be selected who are able to write their own names.⁷⁸

That the witness adds an official title or an official certificate, as of a justice of the peace, to his signature, does not make him any the less an attesting witness.⁷⁹

⁷⁶ *Holyoke v. Lipp*, 77 Neb. 394, 109 N. W. 506.

⁷⁷ *Crittenden's Estate*, Myr. Prob. (Cal.) 50; *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147.

⁷⁸ *Garrett v. Heflin*, 98 Ala. 615, 13 South. 326, 39 Am. St. Rep. 89; *Bailey v. Bailey*, 35 Ala. 690; *Riley v. Riley*, 36 Ala. 496; *Davis v. Semmes*, 51 Ark. 48, 9 S. W. 434; *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *Horton v. Johnson*, 18 Ga. 396; *Thompson v. Davitte*, 59 Ga. 472; *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121.

One subscribing witness cannot sign for the other who is able to write. *Riley v. Riley*, 36 Ala. 496.

Where witness wrote part of his name and stopped, held no sufficient attestation. *Winslow's Estate*, Myr. Prob. (Cal.) 124.

⁷⁹ *Payne v. Payne*, 54 Ark. 415, 16 S. W. 1; *Tevis v. Pitcher*, 10 Cal. 465; *Kelly v. Moore*, 22 App. D. C. 9; *Franks v. Chapman*, 64 Tex. 159; *Hawes v. Nicholas*, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863.

§ 21. Parties in interest as attesting witnesses

The Statute of Frauds was the first statute in England which required witnesses to a will, and immediately after its passage a question arose upon its construction—as to what was meant by credible witnesses. The same question would have arisen even though the word “credible” had not been used, as the mere word witness means a competent witness. Under the rules of the common law a party in interest was not a competent witness; and this test was applied to attesting witnesses of written wills under this statute. All interested parties were excluded from testifying to the execution of a will. Unless the will was attested by the statutory number of disinterested witnesses it could not be admitted to probate, and the maker was held to have died intestate. The courts went to great length in determining who were interested parties, and, as such, incompetent to attest a will. Of course, any one to whom a devise or legacy was given by the will was a party interested in it; and so also was the husband or wife of such devisee or legatee. Where the will charged the debts of the deceased upon his real estate, or made other special provision for creditors over and above what they would have had in case of intestacy, such creditors became interested parties. These constructions of the statute by the courts, while undoubtedly correct on principle,

were the occasion of great hardships and alarmed purchasers and owners of landed property. As pointed out by Blackstone, the testator's wife, children, relatives, servants, business associates—all of the persons who would be likely to be near the bedside of a dying man and to be called upon to witness his will were excluded from doing so. Even a nurse, a physician or an attorney, whose very attendance made them creditors, were incompetent as witnesses. To correct this matter, it was at length enacted by the 25 Geo. II, c. 6, that creditors should be competent witnesses to a will; and that where a will was witnessed by any person to whom any devise or legacy was given therein, such devise or legacy only should be void, and the will should otherwise be valid, and the witness should be competent to prove its execution.⁸⁰ It was fur-

⁸⁰ Jones v. Habersham, 63 Ga. 146; Williams v. Way, 135 Ga. 103, 68 S. E. 1023; Cornwell v. Isham, 1 Day (Conn.) 35, 2 Am. Dec. 50; Hawley v. Brown, 1 Root (Conn.) 494; Clark v. Hoskins, 6 Conn. 106; Goodrich's Appeal, 57 Conn. 282, 18 Atl. 49; Lewis v. Aylott, 45 Tex. 190; Fowler v. Stagner, 55 Tex. 393; Nixon v. Armstrong, 38 Tex. 296.

Statute 25 Geo. II, ch. 6, § 1, rendering null and void any bequest or devise to an attesting witness, is in force in District of Columbia. Elliott v. Brent, 17 D. C. 98.

In Alabama the English statutes were early adopted, making legatees and other parties in interest competent witnesses to a will and rendering the legacy void. Later revision made them competent without affecting their legacy. Kumpe v. Coons, 63 Ala. 448; Perkins v. Windham, 4 Ala. 634; Henry v. Hall, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; Snider v. Burks, 84 Ala. 56, 4 South. 225.

An attorney who writes will may attest same. Schieffelin v. Schieffelin, 127 Ala. 36, 28 South. 687.

ther provided that if a devisee or legatee, being an attesting witness, should, before the probate of the will, have paid to him or should have refused to accept the gift mentioned he should then become a competent witness; but that he should never afterward claim under the will. This statute has been substantially incorporated into the statutes of most of the American states. The statutes of some states are a little more liberal than the English act inasmuch as they provide that where an attesting witness would, in case of intestacy, be entitled to a share of the testator's estate, so much of such share shall be preserved to him as does not exceed his gift under the will, notwithstanding the devise or bequest to him becomes void by reason of his being an attesting witness.⁸¹

The rule of the common law which disqualifies as a witness a party interested in the dispute has been abrogated generally in this country. A party in interest is fully restored to competency as a witness in all cases except in the single matter of wills. In regard to wills, his competency is conditional, as we have seen; and a reference to the English acts and decisions is necessary to make clear the

⁸¹ *Fortune v. Buck*, 23 Conn. 1; *Grimm v. Tittman*, 113 Mo. 56, 20 S. W. 664; *Graham v. O'Fallon*, 4 Mo. 601; *Trotters v. Winchester*, 1 Mo. 413; section 8679, G. S. Kan. 1905; *Clark v. Miller*, 65 Kan. 726, 68 Pac. 1071, 70 Pac. 586. But a husband may testify as subscribing witness to a will in which his wife is a legatee. *Lanning v. Gay*, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407.

present condition of our statute law on that particular subject.⁸²

Even a person named as executor or testamentary trustee was incompetent formerly as a witness to the will.⁸³ But by later statutes the executor or trustee is rendered competent, without avoiding his appointment, if he is not beneficially interested in the will.⁸⁴

The rule of the common law excluding devisees and other parties in interest, and the modern statutes making them competent upon condition of

⁸² *Lewis v. Aylott*, 45 Tex. 190.

Credible witness means competent. *Brown v. Pridgen*, 56 Tex. 124; *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308.

Review of the English Statutes of Wills and competency of attesting witnesses. *Starr v. Starr*, 2 Root (Conn.) 303-308.

Wife is competent witness to will. *Hatfield's Will*, 21 Colo. App. 443, 122 Pac. 63.

Pewholders in a church are not incompetent as attesting witnesses to a will giving a legacy to the church. *Russell v. Russell's Ex'r*, 3 Houst. (Del.) 103.

Members of a fraternal order are competent as attesting witnesses to a will containing a bequest to such order. *Kennett v. Kidd*, 87 Kan. 652, 125 Pac. 36, 44 L. R. A. (N. S.) 544, Ann. Cas. 1914A, 592.

Wife of legatee is competent as subscribing witness under statute. Neither her relationship nor interest affects her competency. *Gamble v. Butcheer*, 87 Tex. 643, 30 S. W. 861.

⁸³ *Sutton v. Sutton*, 5 Har. (Del.) 459; *Davis v. Rogers*, 1 Houst. (Del.) 44; *Williams v. Wells* (D. C.) Hayw. & H. 116, Fed. Cas. No. 17,746; *Murphy v. Murphy*, 24 Mo. 526; *Elliott v. Welby*, 13 Mo. App. 19.

⁸⁴ *Panaud v. Jones*, 1 Cal. 488; *Peralta v. Castro*, 6 Cal. 354; *Spiegelhatter's Will*, 1 Pennewill (Del.) 5, 39 Atl. 465; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441; *Hays v. Ernest*, 32 Fla. 18, 13 South. 451; *Baker v. Bancroft*, 79 Ga. 672, 5 S. E. 46.

relinquishing their claims under the will, apply to attesting witnesses only, and not to devisees or legatees who might be called generally as witnesses in a will contest.⁸⁵

§ 22. Competency of attesting witnesses in general

Aside from the matter which we have been considering—of the attesting witnesses being interested in the will—the competency and credibility of such witnesses is governed by the same rules which govern other witnesses. Attesting witnesses must be persons of sufficient age, intelligence and moral standing to entitle them to testify in other matters. Therefore a young child or a felon or a person of defective understanding is incompetent to attest a will.⁸⁶ If two attesting witnesses are competent, the fact that another person who was incompetent also attested the will cannot impair its validity.⁸⁷ The rule is that the witness should be competent at the time of the execution of the will; this is all that is necessary, and it is

⁸⁵ *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255; *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214.

⁸⁶ *Curtiss v. Strong*, 4 Day (Conn.) 51, 4 Am. Dec. 179.

It is not necessary that witnesses should have sufficient acquaintance with testator to testify to his testamentary capacity. *Huff v. Huff*, 41 Ga. 696.

Judge of Probate is competent witness to a will. *Ford's Appeal*, 2 Root (Conn.) 232; *McLean v. Barnard*, 1 Root (Conn.) 462.

⁸⁷ *Conoly v. Gayle*, 61 Ala. 116.

held that if he afterward becomes incompetent that fact does not affect the proof of the will. Any other rule would be singularly unjust, as it would leave the testator's most carefully planned dispositions of his estate at the mercy of the attesting witnesses.⁸⁸

§ 23. Alterations, corrections and additions

On principle, as we have seen, additions of any kind to wills, either upon the face of the writing itself or by codicils or other separate papers, cannot be made unless their execution is attended by the same formalities as a new will.⁸⁹ As to alterations and corrections the rule in regard to wills is directly opposite to that in regard to deeds.

The modern rule in regard to a deed is that an alteration appearing upon the face of the deed unexplained is presumed to have been made before execution and delivery and hence to be read as part of the deed. The rule in regard to wills, which do not take effect until the death of the maker, is that alterations or erasures appearing upon the face of a will are presumed to have been made *after* its execution; and hence the alterations have no effect unless the will is re-executed in its altered condition, or the presumption is rebutted by a reference to the alterations in the attesting clause.⁹⁰

⁸⁸ *Holmes v. Holloman*, 12 Mo. 535; *Hopf v. State*, 72 Tex. 281, 10 S. W. 589.

⁸⁹ *Notes v. Doyle*, 32 App. D. C. 413.

⁹⁰ *Varnon v. Varnon*, 67 Mo. App. 534; *Southworth v. Southworth*,

Unattested alterations of a will after its execution are rejected, and the will must be probated with its altered parts restored to their original state.⁹¹ Alterations of any sort made in a will by a stranger to it, without the knowledge of the testator, have no effect whatever, and the instrument must be admitted to probate as it stood originally. Such changes are a mere spoliation, and parol evidence will always be received to show the original contents of the will.⁹²

§ 24. Holographic wills

What we have thus far been considering applies to the ordinary form of written wills usually drawn up by some friend or legal adviser of the testator, and then read over to and signed by the testator. A will of this kind is now universally required to be witnessed and attested. There are two other forms of wills which are recognized by the law,

173 Mo. 74, 73 S. W. 129; *Martin v. King*, 72 Ala. 354; *Burge v. Hamilton*, 72 Ga. 568.

Contra: There is no presumption of law as to when an attestation was made. *Scott v. Thrall*, 77 Kan. 688, 694, 95 Pac. 563, 17 L. R. A. (N. S.) 184, 127 Am. St. Rep. 449.

Immaterial alterations do not invalidate will. *McIntire v. McIntire*, 162 U. S. 383, 16 Sup. Ct. 814, 40 L. Ed. 1009; *Id.*, 19 D. C. 482.

⁹¹ *Hartz v. Sobel*, 136 Ga. 565, 71 S. E. 995, 38 L. R. A. (N. S.) 797, Ann. Cas. 1912D, 165.

Unless they amount to spoliation. *Ragan v. Ragan*, 33 Ga. Supp. 106.

⁹² *Monroe v. Huddart*, 79 Neb. 569, 113 N. W. 149, 14 L. R. A. (N. S.) 259; *Thomas v. Thomas*, 76 Minn. 237, 79 N. W. 104, 77 Am. St. Rep. 639; *Holman v. Riddle*, 8 Ohio St. 384.

and which, though more unusual, require some attention. These are holographic wills and nuncupative wills.

Holographic wills were of no greater sanctity under the common law than other written wills. Such a will did not have any greater legal force than a will written by a third party and signed by the testator. The Statute of 32 Hen. VIII, c. 1, explained by 34 Hen. VIII, c. 5, did not require witnesses to wills, and it was not until the enactment of the Statute of Frauds and Perjuries, 29 Car. II, c. 3, that witnesses were required to wills. Although under the Scotch law holographic writings were considered of higher value than other instruments because of the difficulty of successful forgery of them, this regard for such instruments does not seem to have been entertained by the English courts. Such wills grew in favor in this country during the colonial period, where they were generally held good as valid wills of personal property, were recognized by statute, and they were favored in the Code Napoleon in the civil law. The definition of an holographic will is exact; it is a testament written wholly by the testator. In all the jurisdictions of the Union when such wills are recognized, the laws expressly provide that such wills need not be witnessed.⁹³

Holographic wills are so called because they are entirely in the handwriting of the testator. Thus they are deemed to bear upon their face the evidence of their genuineness. For this reason they are recognized as a distinct class by the statutes of some states and are not required to be attested by

⁹³ *Neer v. Cowhick*, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588.

The provision of the California Code relating to holographic wills is taken from the Code Napoleon. *Estate of Fay*, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17. Being the same language as the Civil Code of Louisiana.

witnesses.⁹⁴ The fact that a will has one or more witnesses does not make it any the less a holographic will for the attestation may be treated as surplusage.⁹⁵ Such will, being prepared by the testator without legal or other assistance, is usually very informal in character,⁹⁶ and sometimes fragmentary.⁹⁷ It may be only a letter,⁹⁸ and parol evidence may be necessary to prove the testamentary character of an instrument propounded as a holographic will.⁹⁹ Such a will must be wholly written, dated and signed by the testator.¹ Thus,

⁹⁴ *Ex parte Hornier*, 27 Ark. 443; *Clarke v. Ransom*, 50 Cal. 595; *Skerrett's Estate*, 67 Cal. 585, 8 Pac. 181; *Estate of Learned*, 70 Cal. 140, 11 Pac. 587; *In re Shillaber*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433; *Barker's Estate*, Myr. Prob. (Cal.) 78; *Taylor's Estate*, 126 Cal. 97, 58 Pac. 454; *Estate of Camp*, 134 Cal. 233, 66 Pac. 227; *Stead v. Curtis*, 191 Fed. 529, 112 C. C. A. 463; *McIntire v. McIntire*, 19 D. C. 482; *In re Jensen's Estate*, 37 Utah, 428, 108 Pac. 927; *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 255; *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753; *Perkins v. Jones*, 84 Va. 361, 4 S. E. 833, 10 Am. St. Rep. 863.

Unless the statute expressly so provides the will must be witnessed as other written wills. *Neer v. Cowhick*, 4 Wyo. 49, 31 Pac. 862, 18 L. R. A. 588.

⁹⁵ *Soher's Estate*, 78 Cal. 477, 21 Pac. 8.

⁹⁶ *Clarke v. Ransom*, 50 Cal. 595; *Reith's Estate*, 144 Cal. 314, 77 Pac. 942; *Clisby's Estate*, 145 Cal. 407, 78 Pac. 964, 104 Am. St. Rep. 58.

⁹⁷ *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *In re Stratton*, 112 Cal. 513, 44 Pac. 1028.

⁹⁸ *Arendt v. Arendt*, 80 Ark. 204, 96 S. W. 982; *Estate of Chevalier*, 159 Cal. 161, 113 Pac. 130; *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S. W. 1113.

Two letters not connected by contents cannot constitute holographic will. *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96.

⁹⁹ *Clarke v. Ransom*, 50 Cal. 595.

¹ *Martin's Estate*, 58 Cal. 530.

if the will be upon a printed or engraved blank, though the written part is wholly in the hand of the testator, it is not a holographic will.² The date is an important feature, in some states.³ The signature of the testator need not be at the end of the will, if wherever placed it is intended to authenticate the whole will,⁴ and the part following the signature may be construed part of the will.⁵

Holographic wills are not recognized in all the states, that is, they are accorded no special advantage and must be duly witnessed like other written wills. But even in states that require the full formalities of execution, the fact that a will is holographic may aid in its construction and meaning, or furnish some presumptive evidence to repel an attack on the will, by showing the sanity of the testator, or the absence of undue influence.⁶

² *Rand's Estate*, 61 Cal. 468, 44 Am. Rep. 555; *Billing's Estate*, 64 Cal. 427, 1 Pac. 701; *Estate of Plumel*, 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100.

³ *Martin's Estate*, 58 Cal. 530; *Lakemeyer's Estate*, 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96; *Fay's Estate*, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17; *Clisby's Estate*, 145 Cal. 407, 78 Pac. 964, 104 Am. St. Rep. 58; *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96; *Estate of Price*, 14 Cal. App. 462, 112 Pac. 482; *Heffner v. Heffner*, 48 La. Ann. 1089, 20 South. 281.

The use of different pens and ink by the testator in writing the two sheets of the will does not amount to proof that the will was written as different dates. *Taylor's Estate*, 126 Cal. 97, 58 Pac. 454.

⁴ *Camp's Estate*, 134 Cal. 233, 66 Pac. 227; *Johnson's Estate*, Myr. Prob. (Cal.) 5; *Barker's Estate*, Myr. Prob. (Cal.) 78; *Donoho's Estate*, Myr. Prob. (Cal.) 140; *Lawson v. Dawson*, 21 Tex. Civ. App. 361, 53 S. W. 64.

⁵ *In re Stratton*, 112 Cal. 513, 44 Pac. 1028.

⁶ *Harvey v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Riggin v.*

§ 25. Nuncupative wills

Nuncupative wills are oral wills which are not committed to writing in the lifetime of the testator. They are of very ancient origin and have always been recognized and enforced by the law, though now their use is much restricted by statute.

In the early ages of English jurisprudence wills of personal property were generally by parol. Writing was such a rare accomplishment at that period of the world's history that to have denied the validity of oral wills would have been almost to abolish testamentary power. Verbal wills of personal property could be made to any amount and under any circumstances, and even estates for years in real property, which were classed as chattels, would pass. So, also, uses and trusts could be created in real property by such wills which practically amounted to devises of the lands. When the Statute of Uses and the Statute of Wills were enacted in the reign of Henry VIII no mention was made in them of personal property. These statutes applied only to freehold lands; and hence personal property continued to be subject to disposition by nuncupative wills for a hundred years longer. The first restriction placed upon this right was by the Statute of Frauds, 29 Car. II.⁷

Westminster College, 160 Mo. 575, 61 S. W. 803; Catholic University v. O'Brien, 181 Mo. 71, 79 S. W. 901; Ketchum v. Stearns, 8 Mo. App. 66, affirmed s. c., 76 Mo. 396; Catlett v. Catlett, 55 Mo. 330.

⁷ Statute of Frauds:

"XIX. And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury

The portions of that statute relating to nuncupative wills have been universally adopted in this

be it enacted by the authority aforesaid, that from and after the said four and twentieth day of June (1677) no nuncupative will shall be good where the estate bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present or some of them bear witness that such was his will or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprized or taken sick, being from his own home, and died before he returned to the place of his or her dwelling.

“XX. And be it further enacted, that after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof were committed to writing within six days after the making of the said will.

“XXI. And be it further enacted that no letters testamentary or probate of any nuncupative will shall pass the seal of any court till fourteen days at the least after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have been first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please.

“XXII. And be it further enacted that no will in writing concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only except the same be in the life of the testator committed to writing and after the writing thereof read unto the testator, and allowed by him and proved to be so done by three witnesses at the least.

“XXIII. Provided always that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate as he or they might have done before the making of this act.”

I have never been able to find a full report of the celebrated case

country and remain the law of Missouri and many other states to-day, almost without alteration.⁸

A nuncupative will cannot be sustained in any other cases than those prescribed by statute.⁹ It is not a favorite of the law, and strict proof is required of its existence and terms.¹⁰ Authorities differ as to whether it can be established by the testimony of legatees, only.¹¹

A nuncupative will cannot affect real property;¹² and as to personal property it is confined within very narrow limits, both as to amount and as to

of *Coles v. Mordaunt*. The only reference to it is a footnote in *Mathews v. Warner*, 4 Ves. 195. This was the remarkable case of a nuncupative will which occasioned the passage of the Statute of Frauds.

⁸ *Sykes v. Sykes*, 2 Stew. (Ala.) 364, 20 Am. Dec. 40; *Bradley v. Address*, 27 Ala. 596; *In re Askins*, 20 D. C. 12; *Newman v. Colbert*, 13 Ga. 38 (1852); *Scaife v. Emmons*, 84 Ga. 619, 10 S. E. 1097, 20 Am. St. Rep. 383; *Smith v. Salter*, 115 Ga. 286, 41 S. E. 621; *Stone's Appeal*, 74 Conn. 301, 50 Atl. 734.

Statute requires that no nuncupative will be proved until those entitled by inheritance be cited to appear. *Perez v. Perez*, 59 Tex. 322.

⁹ *Jones v. Norton*, 10 Tex. 120; *Martinez v. De Martinez*, 19 Tex. Civ. App. 661, 48 S. W. 532.

¹⁰ *Mitchell v. Vickers*, 20 Tex. 377; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128; *O'Callaghan v. O'Brien* (C. C. Wash.) 116 Fed. 934.

¹¹ A nuncupative will cannot be established by witnesses having an interest in the will as the only legatees. *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128; *Watts v. Holland*, 56 Tex. 54.

That a nuncupative will is proved by a legatee does not render his legacy void under Georgia statutes. *Smith v. Crotty*, 112 Ga. 905, 38 S. E. 110.

¹² *Will of Kelby* (D. C.) 2 Hayw. & H. 150, Fed. Cas. No. 18,306; *McLeod v. Dell*, 9 Fla. 451; *Lewis v. Aylott*, 45 Tex. 190; *Watts v. Holland*, 56 Tex. 54; *Moffett v. Moffett*, 67 Tex. 642, 4 S. W. 70;

the circumstances under which it is permitted to be made

A special privilege is extended to mariners at sea and soldiers in the military service to bequeath their property as at common law. In the case of others, the will must be made in the last sickness,¹³ and the testator must call those present to bear witness of his intention to make a will.¹⁴ The words must be spoken *animo testandi*.¹⁵ Verbal directions for the preparation of a written will,¹⁶ or an improperly executed written will, cannot be set up as a nuncupative will.¹⁷

Wooldridge v. Hancock, 70 Tex. 18, 6 S. W. 818; *Maurer v. Reifschneider*, 89 Neb. 673, 132 N. W. 197, Ann. Cas. 1912C, 643.

Nuncupative will may authorize executor to sell real estate. *Hurt v. Blackburn*, 20 Tex. 601.

¹³ *Bellamy v. Peeler*, 96 Ga. 467, 23 S. E. 387.

It is held in Kansas that a verbal will need not be made in articulo mortis, nor need the testator be prevented from making a written will by sudden death. *Baird v. Baird*, 70 Kan. 564, 79 Pac. 163, 68 L. R. A. 627, 3 Ann. Cas. 312.

Under the laws of the territory of Oklahoma, no one can make a nuncupative will except those in actual military service in the field, or those doing duty on shipboard at sea, and in these cases only when they are in actual contemplation, fear or peril of death, or at the time are in expectation of immediate death from an injury received the same day. One who at the time is engaged in the pursuit of farming cannot make a valid nuncupative will. *Ray v. Wiley*, 11 Okl. 720, 69 Pac. 809.

¹⁴ *Scales v. Heirs of Thornton*, 118 Ga. 93, 44 S. E. 857; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450, 10 Ann. Cas. 1128.

¹⁵ *St. James Church v. Walker*, 1 Del. Ch. 284.

¹⁶ *Knox v. Richards*, 110 Ga. 5, 35 S. E. 295; *Hunt v. White*, 24 Tex. 643.

¹⁷ *Ellington v. Dillard*, 42 Ga. 361.

Nuncupative wills are now abolished in England by the Statute of Wills of 1 Vict.¹⁸

There is a very close similarity between a nuncupative will and a gift causa mortis; both are testamentary acts; they are revocable during the life of the donor and consummated only by death; both relate to personal property and are made in the last sickness; both also rely for their proof upon words and acts; and it frequently happens that in cases of this kind the circumstances and surroundings are such as to render it an uncertain or disputed point whether the transaction was a nuncupative will or a gift causa mortis. The distinction between them is this; a gift causa mortis is completed only by delivery; when such delivery has taken place the donee retains possession of the property and no probate is necessary to complete his title to it. A nuncupative will, on the other hand, contemplates no delivery, but it must be probated and the other formalities of the statute observed. An interesting discussion of the distinction between these two transactions will be found in a Missouri case.¹⁹

¹⁸ *Hunter v. Bryant*, 2 Wheat. 32, 4 L. Ed. 177.

¹⁹ *Tygard v. McComb*, 54 Mo. App. 85; 2 Blackstone's Commentaries, 500.

CHAPTER III

REVOCATION OF WILLS

- § 26. Revocation in general.
- 27. By subsequent will.
- 28. By burning, tearing, etc.
- 29. Dependent relative revocation.
- 30. Effect on prior will of revocation of subsequent will.
- 31. By marriage and birth of issue.
- 32. By sale of property devised.

§ 26. Revocation in general

We have seen that it is a cardinal principle that a will is revocable during the life of the maker and only becomes irrevocable upon his death. A will is said to be ambulatory during the life of the maker, and hence no title passes by it, and no rights can accrue under it until his decease.

It was stated in Holy Writ as an axiomatic truth, more than 1,800 years ago, that "a testament is of force after men are dead; otherwise it is of no strength at all while the testator liveth," and this axiom has never been varied by legislature or court. Control over the property devised and power to revoke a will as a matter of course last as long as life lasts, and no title to property under a will can possibly pass until the death of the testator.¹

¹ Hart v. West, 16 Tex. Civ. App. 395, 41 S. W. 183; Cozzens v. Jamison, 12 Mo. App. 452; Buckley v. Gray, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862, 52 Am. St. Rep. 88.

Before the death of the testator his will is not admissible in evi-

This ambulatory character pertains to all wills, even those made in the form of a deed ² or contract. The only apparent exceptions are cases where the testator has made a binding contract, founded upon a sufficient consideration, to dispose of property by will in a particular manner. But these are only apparent exceptions, as even wills made in pursuance of such a contract may be revoked as freely as other wills, leaving the testator's estate liable for any damages that may arise by the breach of such contract.³

Revocation is an intent, evidenced by an overt act. It requires the same mental capacity to revoke as to make a will.⁴

dence to show title in a devisee. *Thompson v. Thompson*, 30 Neb. 489, 46 N. W. 638.

Devise has no effect on deed of same property executed in testator's lifetime. *Lewis v. Ames*, 44 Tex. 319.

In Kansas, the statute permits a testator to deposit his will with the probate court in his lifetime. No binding force attaches to a will so deposited, however. It is still revocable, as other wills; and at the time of the testator's death it may not be his last will. On the whole these deposit statutes have proved a failure. *Allen v. Allen*, 28 Kan. 18.

² A testamentary instrument in form of a deed is revocable as other wills, and is revoked by a subsequent conveyance by the grantor to other parties. *De Bajligethy v. Johnson*, 23 Tex. Civ. App. 272, 56 S. W. 95.

³ *Allen v. Bromberg*, 147 Ala. 317, 41 South. 771; *Ross v. Wool-lard*, 75 Kan. 383-386, 89 Pac. 680.

Joint wills are the separate wills of each, and as such revocable. *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135. But see the doctrine in *Bower v. Daniel*, 198 Mo. 325, 95 S. W. 347, as to revocation of joint and mutual wills.

⁴ A deed executed by testator after he became insane will not re-

It must be the act of the maker of the will, and the right is personal to him. It cannot be exercised by the guardian of one who has become incompetent after making the will.⁵

What facts will constitute revocation is a question of law for the court, although the truth of the facts is for the jury.⁶

It becomes important to consider in what manner this revocation may occur; for it is a practical necessity that the revocation should be evidenced in some manner so that it may be satisfactorily shown after the lips of the testator himself are sealed by death.

Prior to the Statute of Frauds, a will in writing could be revoked by parol. This was an extremely loose and dangerous state of the law, for words are very rarely reported by witnesses with absolute correctness. What the testator said might have conveyed to the minds of those who heard him the idea that he was revoking his will when in fact such was not his intention. It is a well understood fact that testators frequently in moments of excitement make use of the most positive and emphatic language to the effect that they revoke certain provisions of their wills, or have revoked them, or will

voke a previous will and devisee in will may maintain an action in equity to cancel the deed. *Hospital Co. v. Philippi*, 82 Kan. 64, 107 Pac. 530, 30 L. R. A. (N. S.) 194.

⁵ *Mastick v. Superior Court*, 94 Cal. 347, 29 Pac. 869.

⁶ *Dickinson v. Aldrich*, 79 Neb. 198, 112 N. W. 293.

revoke them; when on deliberate and mature reflection, their purposes would be directly the opposite of their language. It was this rule of law which allowed a written will to be revoked by parol that gave rise to the famous case which caused the enactment of the Statute of Frauds, and it was one of the purposes of that statute to point out explicitly the manner in which wills should be revoked.⁷

This great statute, in this particular, as in many others, has moulded and governed the modern statute law of this country.⁸ As we have before had

⁷ Statute of Frauds: "VII. And moreover, no devise in writing of lands, tenements or hereditaments, nor any clause thereof shall at any time after the said four and twentieth day of June (1677) be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his directions and consent, but all devises and bequests of lands and tenements shall remain and continue in force until the same shall be burnt, cancelled, torn or obliterated by the testator, or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding."

The verbal declarations of the testator showing a present revocation, or an intention to revoke in the future are not admissible as evidence for any purpose, the statute not authorizing such mode of revocation. *Slaughter v. Stephens*, 81 Ala. 418, 2 South. 145; *Coffee v. Coffee*, 119 Ga. 533, 46 S. E. 620.

Revocation must be as the statute provides. *Kennedy v. Upshaw*, 64 Tex. 411.

⁸ The sixth and twenty-second sections of that act provide:

"Section 6. And moreover no devise in writing of lands, tenements or hereditaments, or any clause thereof, shall at any time after June 24, 1677, be revoked otherwise than by some other will or codi-

occasion to notice, the statute law of the American states has almost abolished all lines of distinction between wills of real estate and wills of personal property by making the same general requirements apply to each.

It may be seen by an examination of these statutes that there are substantially three ways of revoking a testament once duly drawn and executed:

First, by a subsequent will or codicil, in writing.

Second, by doing some act to the instrument itself, such as burning, cancelling, tearing or obliterating.

Third, by a change in the circumstances of the testator.

cil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself, or in his presence and by his direction and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same; any former law or usage to the contrary notwithstanding."

"Section 22. That no will in writing concerning any goods or chattels or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the lifetime of the testator committed to writing, and after the writing thereof, read unto the testator and allowed by him, and proved to be so done by three witnesses at the least."

§ 27. By subsequent will

We shall consider these three modes of revocation in their order: first, revocation by a subsequent will or codicil in writing. It will be noticed that the Statute of Frauds said, "or other writing declaring the same" but our statutes have wisely omitted this vague expression, and the subsequent writing, to have the force of revoking an earlier testamentary act must be a valid will or codicil. In order to be such valid will or codicil it must be executed with all the formalities required by law to admit it to probate.⁹

This is so, even though it contain no disposition of property but its sole intent and purpose is to revoke a previous will.¹⁰ An informal or incomplete will does not have this effect but leaves the prior will in full force.

This second or subsequent will is governed by all the rules as fraud, duress and undue influence that affect other wills. It follows, therefore, that if the testator be mentally unsound, he cannot

⁹ *Lawson v. Morrison*, 2 Dall. 286, 1 L. Ed. 384; *Gaines v. New Orleans*, 6 Wall. 642, 18 L. Ed. 950; (S. C.) *Gaines v. Lizardi*, 154 U. S. 555, 14 Sup. Ct. 1201, 18 L. Ed. 967; *West v. West*, 144 Mo. 119, 46 S. W. 139; *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620; *Barker v. Bell*, 49 Ala. 284; *Notes v. Doyle*, 32 App. D. C. 413; *Castens v. Murray*, 122 Ga. 396, 50 S. E. 131, 2 Ann. Cas. 590; *Leard v. Askew*, 28 Okl. 300, 114 Pac. 251, Ann. Cas. 1912D, 234.

Revocation of prior wills by subsequent will of Gen. Thaddeus Kosciuszko, which was probated by Thomas Jefferson. *Ennis v. Smith*, 14 How. 400, 14 L. Ed. 472.

¹⁰ *Conoway v. Fulmer*, 172 Ala. 283, 54 South. 624, 34 L. R. A. (N. S.) 963; *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147.

make a valid will for any purpose, and his prior will, made while he was sane, will remain in force. The same is true if the subsequent will was made through fraud or by reason of pressure of duress or undue influence.

When a subsequent will is attacked and set aside on these grounds, the prior will then becomes the last will and testament of the deceased and as such is entitled to probate. In fact, it frequently happens that the contest is entirely between the claimants under different wills.¹¹ If the subsequent will be valid, however, being executed by a competent testator with the proper formalities, it has the effect of revoking the prior will,¹² even though it does not refer to it.¹³

A republication at any time may revive a revoked will, but such republication must be with the same formalities as an original execution.¹⁴

In states where holographic wills are recognized there are opposite lines of authorities on the question whether a duly attested will can be revoked by a later holographic one.¹⁵ This depends somewhat on the statute authorizing holographic wills.

¹¹ Will once executed remains valid until revoked as provided by statute. *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753.

¹² *Wilson v. Bostick*, 151 Ala. 536, 44 South. 389.

¹³ *Clarke v. Ransom*, 50 Cal. 595.

¹⁴ *Barker v. Bell*, 49 Ala. 284; s. c., 46 Ala. 216.

¹⁵ Holographic instrument will revoke prior attested will. *Soher's Estate*, 78 Cal. 479, 21 Pac. 8.

Holographic instrument will not revoke prior attested will. *Par-ker v. Hill*, 85 Ark. 363, 108 S. W. 208.

The later testamentary instrument may not be intended to have the effect of revoking the prior will.¹⁶ It may be designed as a supplementary will or codicil. In such case it is a revocation pro tanto only.¹⁷ The very purpose of a codicil is to make certain changes in the original will, usually revoking some of the gifts and making different disposition of the property.¹⁸ The codicil therefore operates as a republication of the will as altered, and the two must be construed as one instrument speaking from the date of the codicil.¹⁹

In the bitterly contested case of the Miles' will in Nebraska, the question involved was whether a written will which had been produced and probated had been revoked by a subsequent will, which could not be produced and the contents of which

¹⁶ *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Whitney v. Hanington*, 36 Colo. 407, 85 Pac. 84.

¹⁷ *Grimball v. Patton*, 70 Ala. 626; *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *De Laveaga's Estate*, 119 Cal. 651, 51 Pac. 1074; *Home for Incurables v. Noble*, 172 U. S. 383, 19 Sup. Ct. 226, 43 L. Ed. 486; *Bosley v. Wyatt*, 14 How. 390, 14 L. Ed. 468; *Homer v. Brown*, 16 How. 354, 14 L. Ed. 970; *Estate of Dominici*, 151 Cal. 181, 90 Pac. 448; *Estate of Barclay*, 152 Cal. 753, 93 Pac. 1012; *Estate of Cross*, 163 Cal. 778, 127 Pac. 70; *Wheeler v. Fellowes*, 52 Conn. 247; *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 517; *Miller v. Metcalf*, 77 Conn. 176, 58 Atl. 743; *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320; *Govan v. Wiley*, 15 App. D. C. 233; *Colquitt v. Tarver*, 45 Ga. 631.

¹⁸ *Higgins v. Eaton* (C. C.) 188 Fed. 938.

¹⁹ *Payne v. Payne*, 18 Cal. 291; *Estate of Cross*, 163 Cal. 778, 127 Pac. 70; *Smith v. Dolby*, 4 Har. (Del.) 350.

could not be shown.²⁰ This case laid down the following principles:

First: A subsequent will may have the effect of revoking a prior one, if it contain the necessary revoking language, even though the subsequent will, for lack of proof of its dispositions, cannot be carried out, or because being lost or destroyed it is presumptively revoked itself.²¹

Second: The mere fact that a subsequent will was made is not sufficient of itself and without some proof of its actual contents to show the revocation of a prior will. Unless the subsequent will expressly revokes the former one, such former will is only revoked so far as it is inconsistent with the later one.²²

Third: When a subsequent will is lost or cannot be produced it is competent to prove by parol that it contained a clause revoking a former will.²³

²⁰ *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306; s. c., 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769; s. c., 87 Neb. 455, 127 N. W. 904.

²¹ *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306; *In re Cunningham*, 38 Minn. 169, 36 N. W. 269, 8 Am. St. Rep. 650; *Stevens v. Hope*, 52 Mich. 65, 17 N. W. 698.

A conditional will revokes a former will, even though by failure of the condition, the will does not take effect. *Dougherty v. Holscheider*, 40 Tex. Civ. App. 31, 88 S. W. 1113.

²² *Williams v. Miles*, 87 Neb. 455, 127 N. W. 904; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306.

²³ *Williams v. Miles*, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

§ 28. By burning, tearing, etc.

The next mode in which a testator may revoke a testament once validly executed, is by some unequivocal act of destruction to the instrument. Some states follow the Statute of Frauds literally in using the words, "burning, cancelling, tearing, or obliterating." The Kansas statute says: "tearing, cancelling, obliterating or destroying." And here again the modern English cases on this subject cannot be accepted as precedents in all particulars in these states. By the late Statute of Wills, 1 Vict., these words are changed to "burning, tearing or otherwise destroying," and this wording is adopted in some of the American states. This seems to exclude the method of cancelling, which cannot be said to be destroying. Statutes following the Statute of Frauds must be construed like that statute.²⁴

The first thing to be noted is that these acts of destruction must be committed by the testator himself, or by some one in his presence and by his direction. A destruction of the instrument out of his presence or without his consent, does not destroy its legal effect. It is still his will, and still operative as such, even though the paper evidence of it may be gone.²⁵

²⁴ Morgan v. Davenport, 60 Tex. 230.

²⁵ Mann v. Balfour, 187 Mo. 306, 86 S. W. 103.

A letter from a testator to his agent, directing him to destroy the testator's will, does not ipso facto operate as a revocation of the will. Ynan v. Paschal, 27 Tex. 286, 84 Am. Dec. 619.

Under Alabama statute revocation by destruction of will by a per-

It will readily be seen that it would not be a proper or safe rule that would permit a will to be revoked by a destruction of the instrument by some one else not in the presence of the testator. If this were the case, the will might be destroyed by some one with a malicious or fraudulent motive, and then it would become a question of uncertain oral proof whether or not the destruction had been authorized or directed by the testator. The person who had destroyed the will would of course swear that he had been empowered to do so, and the legatees who were the sufferers by the act would be at great difficulty to prove the contrary.

It will be observed, however, that the Kansas statute says "in his presence *or* by his direction," thus implying that if the act be done by the testator's direction it need not be in his presence. This being the plain reading of the statute, the courts cannot aid it by construction, and thus the most salutary feature of the rule is lost.

In the presence of the testator means in his conscious presence, and with his consent, and these facts must affirmatively appear in order to give to the destruction the force of revocation.²⁶

Even where the act of destruction is done by the testator himself he must have done so with the in-

son other than testator must be proved by two witnesses. *Wilson v. Bostick*, 151 Ala. 536, 44 South. 389.

²⁶ *Schaff v. Peters*, 111 Mo. App. 447, 90 S. W. 1037.

tention of revoking.²⁷ The best evidence of testator's intention is his declaration or statement at the time, which thus becomes part of the *res gestæ*.²⁸ Some courts hold that declarations made before or after the act are entirely inadmissible, being in effect but an oral revocation.²⁹ But other courts, on the issue *revocavit vel non*, admit such declarations made before or after.³⁰ The testator might have destroyed the will by mistake, under the impression that it was some other instrument, or he might have been induced to do so by undue influence,³¹ or he might have committed the act while of unsound mind;³² in either of which cases, the act would not be a revocation. A sound mind is just as necessary to the revocation as to the execution of a will.³³

²⁷ *Law v. Law*, 83 Ala. 432, 3 South. 752; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 606.

²⁸ *Woodruff v. Hundley*, 127 Ala. 655, 29 South. 98, 85 Am. St. Rep. 145; *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186; *Kimsey v. Allison*, 120 Ga. 413, 47 S. E. 899; *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025.

²⁹ *Lang's Estate*, 65 Cal. 19, 2 Pac. 491.

³⁰ *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289; *Throckmorton v. Holt*, 12 App. D. C. 552; *Burge v. Hamilton*, 72 Ga. 568-625. But see *Kimsey v. Allison*, 120 Ga. 413, 47 S. E. 899.

³¹ *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504.

³² *In re Johnson's Will*, 40 Conn. 588.

³³ *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

A case illustrating this is found in the English courts: "The evidence showed that the deceased went to his bed-room one morning at 2 a. m. very drunk, and opened his iron safe in order to put away the money he had taken the previous day. That, seeing the will there, he deliberately tore it up into fragments, and threw them on

The act of destruction in order to revoke the will must be completed; for if the testator starts to tear or burn his will and is persuaded to change his mind and preserve the will, this does not amount to a revocation even though the will be partly torn or burned.³⁴

We have seen that the act of destruction must be accompanied by an intention to revoke; and the converse of this proposition is true, that the intention to revoke must be accompanied by some act in order to have that effect.³⁵ An intention to re-

the table at the same time muttering to himself. That on his leaving the room his wife collected the pieces together and locked them up, without saying anything to her husband at the time, although she afterwards informed him of the fact and he expressed great regret at what he had done. The judge said: 'In this case a will was propounded which it was alleged the testator had destroyed when suffering under delirium tremens, that is, when he was insane. The evidence satisfied me that the testator was in an unsound state of mind when he tore up the will; he was suffering from delirium and therefore not capable of exercising any judgment in the matter. The pieces were collected and put together so that the will is now restored to the condition in which it was before the destruction. The testator after the recovery of his senses expressed regret at what he had done, and said he would make another will. I am of opinion that under these circumstances there was no revocation of the will by destruction. The act done by the testator can in no sense be considered his act, for he was then out of his mind, so that there has never been anything at all amounting to a revocation.' " *Brunt v. Brunt*, L. R. 3, P. & D. 37.

³⁴ *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145.

³⁵ *Law v. Law*, 83 Ala. 432, 3 South. 752; *Barksdale v. Davis*, 114 Ala. 623, 22 South. 17; *Manogue v. Herrell*, 13 App. D. C. 455.

Will may be revoked by tearing signature therefrom. *King v. Ponton*, 82 Cal. 421, 22 Pac. 1087.

Sufficient allegation of revocation by destruction. *Barksdale v. Davis*, 114 Ala. 623, 22 South. 17.

voke or destroy a will, no matter how deliberate or positive, will not be sufficient unless accompanied by some act of destruction upon the instrument itself; for otherwise it would operate as a mere oral revocation of a written will which is contrary to the statute.³⁶ The rule is that the intention to revoke and the act of destruction must concur. Thus it has been held in some cases that where the testator asks to have his will destroyed and is told that it has been done, when in fact the will has been preserved, this does not amount to a revocation. This is because there was no sufficient act within the statute. But a fine distinction is made by some cases on this point on the ground of fraud. It has been decided that where a testator requested that his will be brought to him and torn up or burned, and instead of complying with his wishes, another paper is fraudulently brought and destroyed in his presence which the testator is induced to believe is his will, this amounts to a revo-

³⁶ *Spoonemore v. Cables*, 66 Mo. 579; *Goodsell's Appeal*, 55 Conn. 179, 10 Atl. 557; *Hargroves v. Redd*, 43 Ga. 142.

By a statute no written will may be revoked except by written revocation or by destruction of the will by the testator or by his order in his presence.

Fraudulent promise of devisee to destroy a will is not equivalent to revocation. *Locust v. Randle*, 46 Tex. Civ. App. 544, 102 S. W. 946.

If one having possession of will fraudulently refuses to surrender it to the testator for cancellation, this does not amount to a revocation, as nothing more than the intent to revoke exists. *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 427.

cation even though the will is actually preserved.⁸⁷ The testator has done the act as far as lay within his power, and the beneficiaries under the will should not be permitted to take advantage of their fraud.

Some state statutes include the word "cancelling," following the language of the Statute of Frauds, and differing in this respect from the modern English statutes and from the statutes of some of the other American states. Thus a will may be revoked by cancelling it and preserving it in its cancelled condition. It need not be wholly destroyed or wholly obliterated. Under the Statute of Frauds, it was decided that drawing the pen through the signature of the testator or writing across the face of the will "Cancelled" was a sufficient cancelling to revoke the will.⁸⁸ Under this word "cancelling" some courts have held that a partial revocation is permissible; that a single clause of the will may be cancelled by drawing lines through

⁸⁷ *Card v. Grinman*, 5 Conn. 164.

⁸⁸ *Glass v. Scott*, 14 Colo. App. 377, 60 Pac. 186; *Witter v. Mott*, 2 Conn. 68; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 606.

Unattested writing across back of will signed by testator held not to be a revocation in writing nor a revocation by cancellation. *Howard v. Hunter*, 115 Ga. 357, 41 S. E. 638, 90 Am. St. Rep. 121; *Oetjen v. Oetjen*, 115 Ga. 1004, 42 S. E. 387.

No revocation by cancellation shown. *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214.

it, leaving the rest of the will unrevoked.³⁹ Other courts have held drawing a pen through a particular legacy was not a partial revocation, but was either a total revocation or inoperative.⁴⁰ Of course where the word "cancelling" is not used, and the statute follows the language of 1 Vict., "burning, tearing or *otherwise destroying*," a total revocation only is contemplated

No witnesses are required to the cancellation or destruction of the will⁴¹ and therefore if a will, once shown to be duly executed, remains in the testator's possession, and is not found at his death,⁴² or is found in a torn, mutilated or defaced

³⁹ Chinmark's Estate, Myr. Prob. (Cal.) 128; Wikman's Estate, 148 Cal. 642, 84 Pac. 212; Varnon v. Varnon, 67 Mo. App. 534.

While a will may be revoked in part by cancellation in accordance with the statute, yet if the cancellation works an alteration of other portions of the instrument, either by way of addition or substitution, the attempted revocation is invalid, since if held valid it would permit a new and different testamentary disposition to be made in violation of the statute relating to the execution of wills. Miles Appeal, 68 Conn. 237, 36 Atl. 39, 36 L. R. A. 176.

⁴⁰ Law v. Law, 83 Ala. 432, 3 South. 752; Hartz v. Sobel, 136 Ga. 565, 71 S. E. 995, 38 L. R. A. (N. S.) 797, Ann. Cas. 1912D, 165.

⁴¹ Witter v. Mott, 2 Conn. 68.

⁴² McBeth v. McBeth, 11 Ala. 596; Weeks v. McBeth, 14 Ala. 474; Collyer v. Collyer, 110 N. Y. 487, 18 N. E. 110, 6 Am. St. Rep. 405; Hamilton v. Crowe, 175 Mo. 634, 75 S. W. 389; Scott v. Maddox, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263; Spencer's Appeal, 77 Conn. 638, 60 Atl. 289; Dawson v. Smith's Will, 3 Houst. (Del.) 335; In re Johnson's Will, 40 Conn. 588; Lively v. Harwell, 29 Ga. 510; McIntosh v. Moore, 22 Tex. Civ. App. 22, 53 S. W. 611; Boyle v. Boyle, 158 Ill. 228, 42 N. E. 140; Collyer v. Collyer, 110 N. Y. 484, 18 N. E. 110, 6 Am. St. Rep. 405; Behrens v. Behrens, 47 Ohio St.

condition,⁴³ a presumption arises that it was destroyed by the testator *animo revocandi*. This presumption may be rebutted by showing that it was destroyed by accident or mistake, or when the testator was insane,⁴⁴ or by some unauthorized person.

§ 29. Dependent relative revocation

We have seen that the destruction of a former will or the making of a new one, either standing alone, will suffice as a revocation. But what is the effect of both of these acts in conjunction? Strange as it may seem, this has been a much litigated

323, 25 N. E. 209, 21 Am. St. Rep. 820; *Gardner v. Gardner*, 177 Pa. 218, 35 Atl. 558.

This is a presumption of fact only. *Legare v. Ashe*, 1 Bay (S. C.) 464; *Davis v. Sigourney*, 8 Metc. (Mass.) 487; *Minkler v. Minkler*, 14 Vt. 125.

Where two copies of a will are made, failure to produce both copies raises no presumption of revocation. *Snider v. Burks*, 84 Ala. 53, 24 South. 225.

Sufficiency of evidence to support a finding that will, proved to have been executed, but not found, had not been revoked.

The presumption that a will last seen in the custody of the testator has been revoked, if it cannot be found, does not apply where it was last shown in the possession of one whose interest was adverse to its preservation. *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025.

⁴³ *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; *Wikman's Estate*, 148 Cal. 642, 84 Pac. 212; *McIntyre v. McIntyre*, 120 Ga. 67, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 606.

⁴⁴ *Weeks v. McBeth*, 14 Ala. 474; *Patterson v. Hickey*, 32 Ga. 156; *Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015; *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St.

point.⁴⁵ Suppose a testator, intending to make a new will, destroys, or causes to be destroyed his old will, and then neglects to make his new will or is overtaken by insanity, weakness or death before he has an opportunity to do so. In this case does the old will stand revoked? This depends somewhat on the time when the destruction occurred. For if the testator destroyed his old will with the intention of revoking it, but with the further intention of some time in the future making a new one, and then neglects to carry out this latter intention, the revocation of the old one is nevertheless complete and effectual.⁴⁶ If the new will is not in fact made or is not executed in a valid manner, the deceased dies intestate. If he never makes the new will, it does not appear but that he may have changed his mind and concluded not to make one; and if he does make one which is invalid, the courts cannot enforce it; neither can they enforce his old will for it was clearly not his intention that

Rep. 431, 4 Ann. Cas. 306; *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424.

Declarations of testator are admissible to rebut the presumption of a cancellation or revocation of lost or destroyed will. *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Harring v. Allen*, 25 Mich. 505; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336.

⁴⁵ Canceling old will, as part of act of making new one; "dependent relative revocation." Authorities collected. *McIntyre v. McIntyre*, 120 Ga. 67-71, 47 S. E. 501, 102 Am. St. Rep. 71, 1 Ann. Cas. 606.

⁴⁶ *Olmsted Estate*, 122 Cal. 224, 54 Pac. 745.

it should operate as his will. But suppose the new will is prepared or executed and then *as part of the same act* the testator destroys his old will for the purpose of giving effect to the new one. In this case, if the new will for any reason cannot take effect, can it be assumed that the revocation of the old will was only to operate when superseded by a valid new one? In a leading English case, a testator prepared his second will and then cancelled the first, but the second will proved void for non-compliance with the statutory forms of execution; and the court accordingly decided that the first will remained in force, inasmuch as the revoking act, which depended upon the validity of the substituted paper, never took full effect.⁴⁷

It seems, however, that this rule must and should be confined within very narrow limits. It should clearly appear that the testator did not intend in any event to leave himself without a will before the court can fall back on the instrument which has been repudiated by its maker. The limits of this doctrine are well shown in a case in Missouri.

A testator, intending to revoke a will, caused it to be burned. He had already prepared and signed a second will making materially different dispositions of the property. At the time of the burning of the first will, the second will was not attested and the testator understood that until attested it would

⁴⁷ *Onions v. Tyrer*, 2 Vern. 742; *Strong's Appeal*, 79 Conn. 123, 63 Atl. 1089, 6 L. R. A. (N. S.) 1107, 118 Am. St. Rep. 138.

not be complete. It was subsequently attested, and after the death of the testator it was offered for probate but was rejected by the probate court on the ground that at the time of the attestation the testator was not of sound mind. It was then sought to set up and establish the first will on the theory that the first will was only intended to be revoked by the substitution of the second; and that, if for any cause the second failed to take effect, the first will remained in force. But it was held that the burning operated as a complete revocation and this result was not changed by the fact that the second will never took effect.⁴⁸

§ 30. Effect on prior will of revocation of subsequent will

It was formerly the rule that if a prior will was revoked or superseded by a second will, the cancellation or destruction of the second will revived the first.⁴⁹ This was under the theory that the first will was revoked only by the second, and that when the second passed out of existence the first again became the last will and testament of the deceased. This was the rule of the common law. The ecclesiastical courts, however, made it a ques-

⁴⁸ *Banks v. Banks*, 65 Mo. 432; *Varnon v. Varnon*, 67 Mo. App. 534.

⁴⁹ *Dawson v. Smith*, 3 Houst. (Del.) 92; *Peck's Appeal*, 50 Conn. 562, 47 Am. Rep. 685 (overruling *James v. Marvin*, 3 Conn. 576); *Witter v. Mott*, 2 Conn. 68; *Harwood v. Goodright*, 1 Cowp. (Eng.) 87; *Goodright v. Glazier*, 4 Barr. (Eng.) 2512.

tion of the intention of the testator.⁵⁰ In this country by statute most states have abandoned the common law rule and adopted that of the ecclesiastical courts.⁵¹

These statutes settle the rule of law with substantial accuracy although it does not appear distinctly in what manner the intention to revive the prior will should be shown in the terms of the revocation. Probably the testator's declarations at the time, being part of the *res gestæ*, would be sufficient evidence of his intention to revive the prior will; but the safest plan in a case of this kind is to republish the prior will.

This statute has been construed in Missouri as follows: The testatrix executed two wills, one in 1867 and the other in 1869, and then destroyed the second will. After her death the first will was

⁵⁰ *Usticke v. Bowden*, 2 Add. Ecc. 116.

⁵¹ *In re Gould's Will*, 72 Vt. 316, 47 Atl. 1082; *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44; *Bohannon v. Walcot*, 1 How. (Miss.) 336, 29 Am. Dec. 631; *Harwell v. Lively*, 30 Ga. 315, 76 Am. Dec. 649; *Williams v. Williams*, 142 Mass. 515, 8 N. E. 424.

The statute law of Missouri and Kansas has reversed this rule: "If, after making any will, the testator shall duly make and execute a second will, the destruction, cancelling or revoking of any such second will shall not revive the first will, unless it appear by the terms of such revocation, that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will." *Ross v. Woollard*, 75 Kan. 383-386, 89 Pac. 680.

Texas: *Hawes v. Nicholas*, 72 Tex. 481, 10 S. W. 558, 2 L. R. A. 863.

California: *Lones v. Lones*, 108 Cal. 688, 41 Pac. 771.

Nebraska: *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306.

found preserved among her papers in the envelope which had formerly contained the second will. It was held that under our statute the first will was not revived by the destruction of the last, except where an intention to that effect is expressed at the time of the destruction, or where the first will is republished. In this case the first will was not allowed to be probated.⁵²

§ 31. By marriage and birth of issue

The third manner of revoking an existing will is by such a decided change in the circumstances of the testator after the making of the will that the law infers that he no longer intended it to operate. By the common law if a man, after making a will marry and have issue, the will is deemed revoked. The revocation was a presumption of law and hence no evidence was admissible to rebut it.⁵³ Both marriage and birth of issue must occur after the making of the will.⁵⁴ The common law rule

⁵² *Beaumont v. Keim*, 50 Mo. 28.

From the fact that a prior will is found among the testator's papers and a subsequent will is not, the presumption arises that the testator destroyed the subsequent will with intention of revoking, but the further presumption that testator intended thereby to revive the prior will does not arise, as this would be a presumption based upon a presumption. *Williams v. Miles*, 73 Neb. 193, 102 N. W. 482, 105 N. W. 181, 106 N. W. 769.

⁵³ *Shorten v. Judd*, 60 Kan. 73, 55 Pac. 286.

⁵⁴ *Card v. Alexander*, 48 Conn. 504, 40 Am. Rep. 187; *Easterlin v. Easterlin*, 62 Fla. 468, 56 South. 688, Ann. Cas. 1913D, 1316; *Hoitt v. Hoitt*, 63 N. H. 475, 3 Atl. 604, 56 Am. Rep. 530; *Bowers v. Bowers*, 53 Ind. 430; *Marston v. Roe*, 8 Ad. & El. (Eng.) 14; *Brady v.*

still prevails in many of the states. In others variations of the rule by statute occur.⁵⁵ In some, either marriage *or* birth of issue revokes a prior will,⁵⁶ in others marriage alone,⁵⁷ while in others the will is revoked unless made in contemplation of the marriage or the birth of issue,⁵⁸ or provision is made for the issue by the will or by antenuptial

Cubitt, 1 Doug. (Eng.) 31; Christopher v. Christopher, 4 Burr. (Eng.) 2182; Havens v. Van Den Burgh, 1 Denio (N. Y.) 27; Brush v. Wilkins, 4 Johns. (N. Y.) 506; Webb v. Jones, 36 N. J. Eq. 163; Morton v. Onion, 45 Vt. 145; Nutt v. Norton, 142 Mass. 242, 7 N. E. 720.

⁵⁵ Written will can only be revoked as provided for in statute. Marriage and birth of issue after making will do not revoke. Morgan v. Davenport, 60 Tex. 230.

⁵⁶ Goodsell's Appeal, 55 Conn. 179, 10 Atl. 557; Holloman v. Copeland, 10 Ga. 79; Ware v. Wisner (C. C.) 50 Fed. 310; McCullum v. McKenzie, 26 Iowa, 510; Negus v. Negus, 46 Iowa, 487, 26 Am. Rep. 157; Fallon v. Chidester, 46 Iowa, 588, 26 Am. Rep. 164; Carey v. Baughn, 36 Iowa, 540, 14 Am. Rep. 534; Sanders v. Simcich, 65 Cal. 51, 2 Pac. 741.

⁵⁷ Brown v. Scherrer, 5 Colo. App. 255, 38 Pac. 427, affirmed 21 Colo. 481, 42 Pac. 668; Ragan v. Ragan, 33 Ga. Supp. 106-115.

Under statute of Arizona a will is revoked by marriage unless the wife is provided for by marriage contract or in the will, or mentioned therein so as to show an intention not to revoke. Estate of Anderson, 14 Ariz. 502, 131 Pac. 975.

Will of testator made no provision for widow or for child born after making of will; widow renounced will and child's share was the other half. Held that while this did not revoke the will, it rendered all its provisions nugatory. Hobson v. Hobson, 40 Colo. 332, 91 Pac. 929.

⁵⁸ Freeman v. Layton, 41 Ga. 58; Deupree v. Deupree, 45 Ga. 415; Sutton v. Hancock, 115 Ga. 857, 42 S. E. 214; Belton v. Summer, 31 Fla. 139, 12 South. 371, 21 L. R. A. 146; Gay v. Gay, 84 Ala. 38, 4 South. 42.

settlement.⁵⁹ A posthumous child is issue within the meaning of these statutes.⁶⁰

There seems to be no logical reason why the birth of issue subsequent to the will should revoke the entire will. The birth of a single child, perhaps one of many, perhaps a posthumous child, cannot be conclusively presumed to alter all of the testator's plans of distribution. The rights of such after born child can be amply protected by providing that it shall inherit a child's part, notwithstanding the will, or that the will shall be deemed revoked *pro tanto* as to such child.⁶¹

In the case of a woman the common law rule was that marriage alone revoked the previous will.⁶² The statutes of some states qualify this by saying unless the will was executed in contemplation of marriage.⁶³ Whether the will of a married woman is revoked by the death of her then husband and her subsequent marriage has been decided both

⁵⁹ *Corker v. Corker*, 87 Cal. 647, 25 Pac. 922.

An adopted child is not "issue of the marriage," within the meaning of the California Code. *Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414.

⁶⁰ *Hart v. Hart*, 70 Ga. 764.

⁶¹ *Wolfe v. Loeb*, 98 Ala. 426, 13 South. 744.

⁶² 2 Blackstone's Commentaries, p. 499; *Smith v. Clemson*, 6 Houst. (Del.) 171; *Blodgett v. Moore*, 141 Mass. 75, 5 N. E. 470; *In re Kaufman's Will*, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292; *Stewart v. Powell*, 90 Ky. 511, 14 S. W. 496, 10 L. R. A. 57.

⁶³ *Ellis v. Darden*, 86 Ga. 368, 12 S. E. 652, 11 L. R. A. 51; *Gibbons v. McDermott*, 19 Fla. 853; *Colcord v. Conroy*, 40 Fla. 97, 23 South. 561.

ways.⁶⁴ Under statutes which have removed most of the disabilities of married women and conferred express power upon them to dispose of their property by will it has been held that the common law doctrine of the revocation of a will of a married woman by her subsequent marriage is abrogated.⁶⁵

The revocation occurs in these cases by operation of law, independent of the act of the party, and if it is desired to avoid such revocation it is necessary to republish the will after the events have occurred.⁶⁶

⁶⁴ Revoked: *McWhorter v. Oneal*, 121 Ga. 539, 49 S. E. 592.

Not revoked: *Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414.

⁶⁵ *Baacke v. Baacke*, 50 Neb. 18-21, 69 N. W. 303; *In re Fuller's Will*, 79 Ill. 99, 22 Am. Rep. 164; *In re Hunt's Will*, 81 Me. 275, 17 Atl. 68; *In re Ward*, 70 Wis. 251, 35 N. W. 731, 5 Am. St. Rep. 174; *Noyes v. Southworth*, 55 Mich. 173, 20 N. W. 891, 54 Am. Rep. 359.

A will executed by a single woman is revoked by her subsequent marriage, at least to the extent it would operate to exclude her husband from his right as tenant by curtesy in any lands of which she dies seized in her own right of an estate of inheritance. *Vandever v. Higgins*, 59 Neb. 333, 80 N. W. 1043.

⁶⁶ A singular doctrine is announced in Nebraska—revocation by implication from change of circumstances, which is determined in each case by the court. This would certainly make the law a guessing match, in which the court would have the last guess.

"While our statute recognizes revocation of wills by implication of law, it has not undertaken to designate or specify what subsequent changes in the condition and circumstances of the testator will produce such revocation, but it is for the court to determine from the facts of each particular case, under the rules and forms of law, whether the testator intended the will to stand notwithstanding the changes in his condition and circumstances." *Baacke v. Baacke*, 50 Neb. 18-23, 69 N. W. 303. Happily this is mere dicta.

§ 32. By sale of property devised

Wills of land originated as appointments to uses, prior to the Statute of Uses, and therefore they could operate only upon the title which the testator had at the time of the execution of the will. If he parted with such title, either by a valid conveyance or a binding contract to convey, this had in law the effect of revoking the devise even though the same estate became reinvested in the testator during his life.⁶⁷

Now by the modern rule, with the help of some statutes, the revocation is only *pro tanto* or conditional; that is, the will operates on such title as may happen to remain in the testator at the time the will takes effect.⁶⁸ If the devise be specific an absolute sale and parting with the property necessarily revokes the devise.⁶⁹ If there is no estate left in the testator,⁷⁰ or a title which cannot pass

⁶⁷ *McGowan v. Elroy*, 28 App. D. C. 188-199; *Estate of Benner*, 155 Cal. 153, 99 Pac. 715.

⁶⁸ *Cozzens v. Jamison*, 12 Mo. App. 452; *Marshall v. Hartzfelt*, 98 Mo. App. 178, 71 S. W. 1061; *Moore v. Spier*, 80 Ala. 129; *Tillman's Estate*, 3 Cal. Unrep. Cas. 677, 31 Pac. 563; *Bissell v. Feyward*, 96 U. S. 580, 24 L. Ed. 678; *Dean v. Jagoe*, 46 Tex. Civ. App. 389, 103 S. W. 195.

The revocation of a will cannot be implied from the subsequent acquisition of property by the testator which is not affected by the will. *Baldwin v. Spriggs*, 65 Md. 373, 5 Atl. 295.

⁶⁹ *Conn. T. & S. D. Co. v. Chase*, 75 Conn. 683, 55 Atl. 171.

⁷⁰ *McGowan v. Elroy*, 28 App. D. C. 188-199; *Epps v. Dean*, 28 Ga. 533.

under the terms of the devise,⁷¹ the revocation is complete.

But the will passes any portion of the title which remains in the testator or any rights relating to it that may fairly pass.⁷² Powers of attorney,⁷³ contracts to sell the land devised,⁷⁴ sales with lien reserved,⁷⁵ mortgages or encumbrances placed upon it by the testator⁷⁶ or an incomplete taking under eminent domain⁷⁷ are revocations pro tanto only.

⁷¹ Howard v. Carusi, 11 D. C. 260.

⁷² Woodward v. Woodward, 33 Colo. 457, 81 Pac. 322.

⁷³ Estate of Kilborn, 5 Cal. App. 161, 89 Pac. 985.

⁷⁴ Ostrander v. Davis (S. D.) 191 Fed. 156, 111 C. C. A. 636; Welsh v. Pounders, 36 Ala. 668; Slaughter v. Stephens, 81 Ala. 418, 2 South. 145; Bruck v. Tucker, 32 Cal. 425.

⁷⁵ Fields v. Carlton, 75 Ga. 554.

⁷⁶ Stubbs v. Houston, 33 Ala. 555.

⁷⁷ Parker v. Chestnutt, 80 Ga. 12, 5 S. E. 289.

Where a testator by codicil revokes a specific devise in his will on the ground that he has sold the property when in fact he has not sold it, but still owns it at his death, the revocation is presumed to be founded upon a mistake of fact, and the gift is unrevoked. But this rule is one in aid of ascertaining the intent of the testator and must yield to the intent gathered from the will. Dunham v. Averill, 45 Conn. 61-80, 29 Am. Rep. 642; Giddings v. Giddings, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192.

CHAPTER IV

TESTAMENTARY CAPACITY

- § 33. Aliens.
- 34. Convicts.
- 35. Infants.
- 36. Married women.
- 37. Mental capacity.
- 38. Idiots.
- 39. Deaf, dumb, and blind persons.
- 40. Old age.
- 41. Effect of drink, drugs, etc.
- 42. Lunacy—Its nature.
- 43. Lunacy—Lucid intervals.
- 44. Lunacy—Restoration to reason.
- 45. Lunacy—Suicide.
- 46. Delirium from fever or disease.
- 47. Drugs administered for fever or pain.
- 48. Monomania or partial insanity.
- 49. Monomania distinguished from eccentricity, moral perversion or bad temper.
- 50. Insane delusion must affect the will.
- 51. Insane delusion—Spiritualism and other religious beliefs.

§ 33. Aliens

The most natural point from which to begin an investigation of this subject is the proposition that under the policy of the modern law every one has a right to dispose of everything he possesses, by will or otherwise, in any manner he chooses, except where special restraints are imposed by law. In discussing those who are disabled by law from

making a testamentary disposition, we follow the familiar classification of aliens, convicts, infants, married women, and persons of unsound mind.

And first, as to aliens. The disability of aliens is a very ancient one at the common law, and referred chiefly to dispositions of real property. As real property held by an alien was not permitted to descend to his heir, it would have been inconsistent to permit the alien to devise such property. As to personal property, alien friends could always dispose of it to the same extent as natural born subjects. In this country the disability of aliens to hold, convey and devise real property has been abolished by state constitutions and statutes in most of the states. Some states extend these privileges to all aliens, and some confine them to resident aliens. The extent of this right, therefore, becomes a matter of investigation in each state, bearing in mind that aliens had no common law power to convey title to real property either by descent or devise.¹

¹ *Utassy v. Giedinghagen*, 132 Mo. 53, 33 S. W. 444; sections 2915, 4762, 4763, 4764, R. S. Mo. 1899; section 17, Bill of Rights, Constitution of Kansas; *Brigham v. Kenyon* (C. C. Wash.) 76 Fed. 30; *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219; *Jost v. Jost*, 12 D. C. 487.

Residence within Confederate lines did not destroy testamentary capacity during Civil War. *Corbett v. Nutt*, 10 Wall. 464, 19 L. Ed. 976.

The extension of the law of wills of Arkansas to the Indians by act of congress, enabled the Indian to dispose by will of all his alien-

§ 34. Convicts

The next question arises upon the capacity of persons who have been guilty of a felony. By the early common law the mere commission of treason and other felonies, including suicide, destroyed testamentary capacity as to personal property, because such acts involved a forfeiture of the goods of the felon. Parliament might go farther and by a legislative act, known as a bill of attainder, declare the inheritable blood of the felon corrupted so that he could convey no title to real property, either by descent or devise; and this might be done either before or after conviction. This matter is only of historical interest to us now in this country, as by the constitution of the United States, congress and the states are equally prohibited from passing bills of attainder.² And the constitutions of the states provide further security against forfeiture of estates and corruption of blood.³

There seems to be no reason why a person, even though convicted and imprisoned for a crime, may not exercise full testamentary powers. The act does not take effect until after his death, when his punishment is ended. The most that can be said is that his imprisonment might give occasion for

able property, but did not remove the restrictions on alienation as then applied to Indians. *Taylor v. Parker*, 33 Okl. 199, 126 Pac. 573.

² Article 1, §§ 9, 10, article 3, § 3, Constitution of United States.

³ Article 2, § 13, Constitution of Missouri; section 12, Bill of Rights, Constitution of Kansas.

the exercise of some form of duress or undue influence.⁴

§ 35. Infants

At common law females of the age of twelve and males of fourteen could make a valid disposition of personal property by will.⁵ At present the law is settled by statute in most of the states,⁶ and the age is fixed, usually, at eighteen and twenty-one. The definiteness of the statute law leaves little to be discussed on the subject of infants, except to call your attention to the curious rule of the common law that a person is of age at the earliest moment of the day *preceding* his twenty-first birthday, or eighteenth birthday, as the case may be.

§ 36. Married women

Married women are now clothed with the same powers of testamentary disposition as men.⁷ All of the law in regard to the consent of the husband being necessary to the validity of the will of a mar-

⁴ 2 Blackstone's Commentaries, p. 497.

⁵ Banks v. Sherrod, 52 Ala. 270.

⁶ Will personal property at 18. Allen v. Watts, 98 Ala. 384, 11 South. 646; Daniel v. Hill, 52 Ala. 430; Banks v. Sherrod, 52 Ala. 267. Personal and real at 14. O'Byrne v. Feeley, 61 Ga. 77.

Person under 21 cannot make a will by act of 1840.

Heirs at law are not estopped from averring the minority of the testator by having dealt with him as sui juris. Moore v. Moore, 23 Tex. 637.

⁷ Emmons v. Garnett, 18 D. C. 52; Ferrell v. Gill, 130 Ga. 534, 61 S. E. 131, 14 Ann. Cas. 471; Urquhart v. Oliver, 56 Ga. 344; Vanderveer v. Higgins, 59 Neb. 333, 338, 80 N. W. 1043.

ried woman is rapidly becoming obsolete. Occasional reference to it may be necessary, however, in examining wills which took effect prior to the passage of the enabling statutes. Instead of going into the labyrinth of rules and principles which formerly hedged about the power of a married woman to make a will, it may be said briefly that at common law a married woman could not make a valid will of personal property without the consent, express or implied, of her husband;⁸ and she could not make a valid will of real property except under a power of appointment reserved to her in the instrument by which the property was conveyed to her or settled to her use.⁹ As will be hereafter noted the statute law gives to each spouse certain rights in the property of the other that are not subject to disposition by will. But subject to

⁸ *Hines v. Gordon*, 2 Hayw. & H. (D. C.) 222, Fed. Cas. No. 18,302; *Myers v. Egguer*, 6 Houst. (Del.) 342; *Cavanaugh v. Ainchbacker*, 36 Ga. 500, 91 Am. Dec. 778; *Chapman v. Gray*, 8 Ga. 337; *McGowan v. Jones*, R. M. Charlt. (Ga.) 184.

⁹ *Churchill v. Corker*, 25 Ga. 479; *Fitch v. Brainerd*, 2 Day (Conn.) 163; *Mitchell v. Hughes*, 3 Colo. App. 43, 32 Pac. 185; *Weeks v. Sego*, 9 Ga. 199; *Barnes v. Irwin*, 2 Dall. (Pa.) 199, 1 L. Ed. 348, 1 Am. Dec. 278; *Hamilton v. Rathbone* (D. C.) 175 U. S. 414, 20 Sup. Ct. 155, 44 L. Ed. 219; *Baker v. Chastang's Heirs*, 18 Ala. 417; *Burton v. Holly*, 18 Ala. 408; *Gannard v. Eslava*, 20 Ala. 732; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322; *Coleman v. Robertson*, 17 Ala. 84; *Murphree v. Senn*, 107 Ala. 424, 18 South. 264; *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; *Comassi's Estate*, 107 Cal. 1, 40 Pac. 15, 28 L. R. A. 414; *Martin v. Fort* (Tenn.) 83 Fed. 19, 27 C. C. A. 428; *Blake v. Hawkins* (N. C.) 98 U. S. 315, 25 L. Ed. 139; *Lee v. Simpson* (S. C.) 134 U. S. 572, 10 Sup. Ct. 631, 33 L. Ed. 1038.

these rights a married woman may now make a will as freely as a married man.¹⁰

§ 37. Mental capacity

We now enter upon the broad field of inquiry as to what persons are incompetent to make wills by reason of being of unsound mind. The study of mental phenomena is one filled with the greatest difficulty, for the reason that such phenomena are even at this day very little understood. Trained medical experts are devoting their whole lives to the investigation of the causes of mental aberration; but the result of their investigations thus far has been to produce so many refined distinctions and classifications, and such a mass of conflicting theories, that they confuse more than they enlighten the ordinary man.¹¹ Much attention has been directed recently to the study of the mind and some curious theories have gained a footing among scientific men; but nothing practical has yet been developed which can be incorporated into the law of wills. It has been said that very few persons possess a perfectly sound mind. In the sense of a mind evenly balanced in all its parts and faculties, this is undoubtedly true: but most persons possess a sufficiently sound mind to distinguish right from wrong and to look after their own affairs. Those

¹⁰ *Engleman v. Deal*, 14 Tex. Civ. App. 1, 37 S. W. 652; *Brown v. Pridgen*, 56 Tex. 124.

¹¹ *Dunham's Appeal*, 27 Conn. 192, 201.

who do not are the exception. The only rule that can safely be adopted in the administration of the law, therefore, is that every man must be presumed to be sane until he is shown to be otherwise. Speculative theories are more injurious than helpful in this subject, and the law knows but one test; it submits the whole subject of soundness or unsoundness of mind in the particular case to the decision of a jury of average citizens. Mental unsoundness embraces a wide range of causes and an infinite variety of effects; and each of the numerous classifications is subject to variation in individual cases by reason of temperament and surroundings. The same general rule is applied to all cases of mental unsoundness from whatever cause. It is this:

The proper question to submit to the jury is, "Were the testator's mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will?"

The supreme court of Missouri lays down the general rule of law when it says:

One who is capable of comprehending all his property, and all of the persons who reasonably come within the range of his bounty; and who has sufficient intelligence to understand his ordinary business, and to know what disposition he is making of his property, has sufficient capacity to make a will.¹²

¹² Jackson v. Hardin, 83 Mo. 175.

In some recent cases the supreme court of Missouri has added to this a requirement that the testator not only comprehend the per-

§ 38. Idiots

Among those mentally deficient, the first class to consider is idiots. An idiot is one who is born with a mind so naturally deficient that he cannot exercise ordinary intelligence. Swinburne, one of the oldest English writers on wills, says, that an idiot is he who cannot count twenty or tell the name of his own father and mother. This is not regarded as a test, but only as an illustration of idiocy; for a

sons who reasonably come within the range of his bounty, but "*their deserts with reference to their treatment of him.*" This comes dangerously near giving the jury a roving commission to pass upon the justice and propriety of the particular dispositions made. The question should be confined to competency, not justice. It is to be hoped that this innovation will disappear from our law. *Turner v. Anderson*, 236 Mo. 523, 139 S. W. 180; *Crum v. Crum*, 231 Mo. 626, 132 S. W. 1070.

Testamentary capacity. *McElroy v. McElroy*, 5 Ala. 81; *Coleman v. Robertson*, 17 Ala. 84; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Stubbs v. Houston*, 33 Ala. 555; *O'Donnell v. Rodiger*, 76 Ala. 223, 228, 52 Am. Rep. 322; *Kramer v. Weinert*, 81 Ala. 416, 1 South. 26; *Schieffelin v. Schieffelin*, 127 Ala. 34, 28 South. 694; *White v. Farley*, 81 Ala. 563, 8 South. 215; *Garrett v. Hefin*, 98 Ala. 615, 13 South. 326, 39 Am. St. Rep. 89; *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *McBride v. Sullivan*, 155 Ala. 166, 45 South. 902; *Mullen v. Johnson*, 157 Ala. 262, 47 South. 584; *Abraham v. Wilkins*, 17 Ark. 292; *Ouachita Baptist College v. Scott*, 64 Ark. 349, 42 S. W. 586; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Black's Estate*, Myr. Prob. (Cal.) 24; *Tittel's Estate*, Myr. Prob. (Cal.) 12; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *McClintock v. Curd*, 32 Mo. 411; *Benoist v. Murrin*, 58 Mo. 307; *Delaney v. City of Salina*, 34 Kan. 532, 9 Pac. 271; *Hudson v. Hughan*, 56 Kan. 152, 42 Pac. 701; *Barnes v. Wakeman*, 69 Kan. 853, 76 Pac. 1128; *Gordon v. Burris*, 153 Mo. 231, 54 S. W. 546; *Sturdevant's Appeal*, 71 Conn. 393, 42 Atl. 70; *St. Leger's Appeal*, 34 Conn. 439, 91 Am. Dec. 735; *Havens v. Mason*, 78 Conn. 410, 62 Atl. 615, 3 L. R. A. (N. S.) 172; *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610; *Steele v. Helm*, 2

person may be able to do these, and yet not have the capacity to make a will or a contract. Idiots or imbeciles are totally wanting in capacity for business or for intelligent labor, and are incapable of mental improvement; they are wholly deficient both in the perceptive and reflective faculties; they possess neither observation nor judgment, and the little memory they have is wholly passive; they have no ability to recollect at will past transactions,

Marv. (Del.) 237, 43 Atl. 153; *Chandler v. Ferris*, 1 Har. (Del.) 454; *Duffield v. Morris Ex'r*, 2 Har. (Del.) 375; *Ball v. Kane*, 1 Pennewill (Del.) 90, 39 Atl. 778; *Smith v. Smith's Adm'r*, 2 Pennewill (Del.) 245, 45 Atl. 396; *Pritchard v. Henderson*, 3 Pennewill (Del.) 128, 50 Atl. 217; *Cordrey v. Cordrey*, 1 Houst. (Del.) 269; *Jamison v. Jamison's Will*, 3 Houst. (Del.) 108; *Hall v. Dougherty*, 5 Houst. (Del.) 435; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Hall v. Hall*, 18 Ga. 40; *Stancell v. Kenan*, 33 Ga. 56; *Ragan v. Ragan*, 33 Ga. Supp. 106; *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606; *Garrison v. Blanton*, 48 Tex. 299; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Berst v. Moxom*, 157 Mo. App. 342, 138 S. W. 74; *Id.*, 163 Mo. App. 123, 145 S. W. 857; *Luebbert v. Brockmeyer*, 158 Mo. App. 196, 138 S. W. 92; *In re Estate of Nelson*, 75 Neb. 298, 106 N. W. 326; *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

An instruction that overstates the capacity necessary. *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890.

Finding of lack of capacity sustained. *In re Estate of Frederick*, 83 Neb. 318, 119 N. W. 667, 120 N. W. 1131.

Instructions approved. *Estate of Higgins*, 156 Cal. 257, 104 Pac. 6; *Comstock v. Hadlyme*, 8 Conn. 264, 20 Am. Dec. 100; *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Mowry v. Norman*, 223 Mo. 463, 122 S. W. 724; *Naylor v. McTuer*, 248 Mo. 423, 154 S. W. 772; *In re Estate of Wilson*, 78 Neb. 758, 111 N. W. 788.

Instruction disapproved. *Denson v. Beazley*, 34 Tex. 191.

and no forecast. All these powers in a greater or less degree enter into the act of an understanding disposition of property to take effect after one's death, and without the basis of these faculties it is confessedly impossible for one to execute a valid will.

The courts at one time went very far in holding that the least spark of intelligence would enable one to make a valid will; and in the famous case of *Stewart v. Lispenard*, 26 Wend. (N. Y.) 255, it was held that an idiot under legal guardianship could make a will. But this decision of the New York Courts was afterwards overruled in the same state in the case of *Delafield v. Parish*, 25 N. Y. 27. By that and subsequent decisions the rule is settled in accordance with the general rule before stated, that it is a question of fact whether the testator had sufficient capacity for the act performed. In Missouri a case arose¹⁸ in which the evidence showed that the testator, Casper Rueggesick, was a weak-minded man. He had suffered from a sun-stroke at one time in life and after that event his mental powers seemed to be impaired. He never married, and took no interest in anything except his farming occupation, in which he was fairly proficient. He cared nothing for money, and had no business transactions or contracts with anyone, and never attended elections or spoke of matters of public con-

¹⁸ *Brinkman v. Rueggesick*, 71 Mo. 553.

cern. He worked for twenty or thirty years for his brother and sister-in-law on their farm without compensation — simply making his home with them. After his brother's death he continued to reside with his sister-in-law. Upon the death of his brother, he inherited from his estate about five hundred dollars, which the administrator tendered to him, but which he declined to receive, and it was handed to his sister-in-law to keep for him. At one time a guardian was appointed for him but when it was found that he was simply a harmless old man and not likely to squander his property the guardian resigned his trust, and no other was afterward appointed. The only property he had was this \$500 from his brother's estate and he died leaving a will by which he bequeathed it to his sister-in-law, to the exclusion of his own brothers and sisters. The will was contested by the brothers and sisters on the ground of want of testamentary capacity and the trial resulted in setting aside the will. On appeal to the supreme court, the judgment was reversed and the will sustained on the ground that the testator at the time he executed it had sufficient capacity to understand what he was doing and to whom he was giving his property. This will seems to have been sustained under these circumstances principally because it was such a simple will and a very natural and proper one. In other words, the internal evidence of the will itself, and the evidence of the surrounding circumstances

had a great influence on the result. If the will had been a complicated one, or unnatural in any of its provisions, it would not have been sustained.¹⁴

§ 39. Deaf, dumb and blind persons

Deaf, dumb and blind persons were formerly included in the same class with idiots, among those who lacked testamentary capacity; and the reason given was that they were deprived of the use of those senses through which intelligence could be communicated.¹⁵ The modern law has restored their capacity and sustains their testamentary acts where the proof of their intention is clear and no circumstances of imposition appear.

Ordinarily when a testator subscribes and executes a will in the mode prescribed by law, the facts of such subscription and execution are sufficient proof that the instrument speaks his language and expresses his will; but when the testator is deaf and dumb, or unable to read and write or speak, something more is demanded. There must then not only be proof of the factum of the will, but also that the mind of the testator accompanied the act, and that the instrument executed speaks his language and really expresses his will.¹⁶

This is undoubtedly the better rule and the safer one for a practitioner to keep in mind if he be directing the execution of the will of such a person.

¹⁴ Weak-minded, but capable of executing will. *St. Joseph's Convent v. Garner*, 66 Ark. 623, 53 S. W. 298.

Arrested development of mind. *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

¹⁵ 2 Blackstone's Commentaries, p. 497.

¹⁶ *Rollwagen v. Rollwagen*, 63 N. Y. 504.

Some courts have held, however, that even in the case of persons who cannot read, it is not necessary as a matter of law to prove that the will was read to him.¹⁷

§ 40. Old age

The next form of mental weakness, nearly allied to idiocy, is the childishness of old age. This is known in the law of wills as senile dementia. It is nothing else than a decay or wearing out of the mental faculties, which frequently occurs in extreme old age, and sometimes earlier in life. If this decay of the mind has reached a point where our test would apply, namely, that the testator did not understand the act in which he was engaged, then the capacity of the testator to make a valid will is gone, whatever his age may be.¹⁸ But mere age, however great, is not alone sufficient to defeat a will: for persons may be and frequently are very clear in mind, though very weak and infirm in body. The courts are very careful not to lightly interfere with a will on the ground of old age mere-

¹⁷ *Guthrie v. Price*, 23 Ark. 396.

¹⁸ *Roberts v. Bartlett*, 190 Mo. 696, 89 S. W. 858; *Langley's Estate*, 140 Cal. 129, 73 Pac. 824; *Hudson v. Hughan*, 56 Kan. 152, 42 Pac. 701; *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801; *Estate of Huston*, 163 Cal. 166, 124 Pac. 852; *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035; *Luebbert v. Brockmeyer*, 158 Mo. App. 196, 138 S. W. 92; *Berst v. Moxom*, 157 Mo. App. 342, 138 S. W. 74; *Id.*, 163 Mo. App. 123, 145 S. W. 857; *Mason v. Rodriguez*, 53 Tex. Civ. App. 445, 115 S. W. 868.

ly; no matter how old the person may be, nor how infirm in body.¹⁹ The testamentary power is a valuable right which should be preserved and

¹⁹ *Van Alst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *McFadin v. Catron*, 120 Mo. 267, 25 S. W. 506; *Id.*, 138 Mo. 216, 38 S. W. 932, 39 S. W. 771; *Wood v. Carpenter*, 166 Mo. 487, 66 S. W. 172; *Hamon v. Hamon*, 180 Mo. 685, 79 S. W. 422; *Rule in Benoist v. Murriu*, 48 Mo. 48; *Id.* 58 Mo. 307, affirmed.

Mental weakness from sickness and old age. (1884) *Jackson v. Hardin*, 83 Mo. 175; (1889) *Myers v. Hauger*, 98 Mo. 433, 11 S. W. 974; (1889) *Thompson v. Ish*, 99 Mo. 160-180, 12 S. W. 510, 17 Am. St. Rep. 552; (1892) *Norton v. Paxton*, 110 Mo. 465, 19 S. W. 807; (1892) *Couch v. Gentry*, 113 Mo. 249, 20 S. W. 890; (1892) *Maddox v. Maddox*, 114 Mo. 44, 21 S. W. 499, 35 Am. St. Rep. 734; (1895) *Farmer v. Farmer*, 129 Mo. 538, 31 S. W. 926; (1897) *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576; (1897) *Von De Veld v. Judy*, 143 Mo. 364, 44 S. W. 1117; (1898) *Riley v. Sherwood*, 144 Mo. 363, 45 S. W. 1077; (1898) *Fulbright v. Perry Co.*, 145 Mo. 442, 46 S. W. 955; (1899) *Sehr v. Lindemann*, 153 Mo. 288, 54 S. W. 537; (1900) *Riggin v. Westminster College*, 160 Mo. 579, 61 S. W. 803; (1901) *Kischman v. Scott*, 166 Mo. 227, 65 S. W. 1031; (1901) *Wood v. Carpenter*, 166 Mo. 487, 66 S. W. 172; (1902) *Crowson v. Crowson*, 172 Mo. 701, 72 S. W. 1065; (1903) *Catholic University v. O'Brien*, 181 Mo. 90, 79 S. W. 901; (1906) *Hill v. Boyd*, 199 Mo. 438, 97 S. W. 918; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. 690, 14 Am. St. Rep. 706; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Huffaker v. Beers*, 95 Ark. 158, 128 S. W. 1040; *Estate of Motz*, 136 Cal. 558, 69 Pac. 294; *Latour's Estate*, 140 Cal. 414, 73 Pac. 1070; *Dougherty's Estate*, 139 Cal. 10, 14, 72 Pac. 358; *Estate of Morey*, 147 Cal. 495, 82 Pac. 57; *Kinne v. Kinne*, 9 Conn. 105, 21 Am. Dec. 732; *Richmond's Appeal*, 59 Conn. 245, 22 Atl. 82, 21 Am. St. Rep. 85; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Kennett v. Kidd*, 87 Kan. 652, 125 Pac. 36, 44 L. R. A. (N. S.) 544, Ann. Cas. 1914A, 592; *Wolfe v. Whitworth*, 170 Mo. App. 372, 156 S. W. 715; *Gaston v. Gaston*, 83 Kan. 215, 109 Pac. 777; *Harper v. Harper*, 83 Kan. 761, 113 Pac. 300; *In re Estate of Owen*, 73 Neb. 840, 103 N. W. 675; *Estate of Packer*, 164 Cal. 525, 129 Pac. 778.

guarded by the courts; for as said by Chancellor Kent:

It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has in protracted life to command the attention due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent arts, but contains those very dispositions which the circumstances of his situation, and the course of the natural affections dictated.

It is not soundness of body but of mind that is requisite to sustain the execution of instruments. The law looks only to the competency of the understanding, and neither age nor sickness, nor extreme distress nor debility of body will affect the capacity to make a conveyance, if sufficient intelligence remains.²⁰

The loss of memory is one of the earliest and surest indications of mental decay. As this is an important faculty to be exerted in composing a will, the loss of it will necessarily be fatal to the validity of a testamentary instrument. But a mere partial loss of memory is not sufficient, otherwise many very shrewd and intelligent people would be

²⁰ Bowdoin College v. Merritt (C. C.) 75 Fed. 480; Estate of Huston, 163 Cal. 166, 124 Pac. 852; Wood v. Lane, 102 Ga. 199, 29 S. E. 180; Lindsey v. Stephens, 229 Mo. 600, 129 S. W. 641; McIntosh v. Moore, 22 Tex. Civ. App. 22, 53 S. W. 611; Stull v. Stull, 1 Neb. (Unof.) 389, 96 N. W. 196; In re Weber, 115 Cal. 224, 114 Pac. 597; In re Estate of Winch, 84 Neb. 251, 121 N. W. 116, 18 Ann. Cas. 903.

denied testamentary capacity. The loss must be so marked as to prevent the testator from recalling and holding in his mind his property and those persons to whom he would and should give it.²¹ In fact, it has been said that one may have memory sufficient to make a will when his capacity for ordinary transactions is practically gone; for the subject of the testamentary disposition of his property is one to which he has probably given mature and serious consideration and thought, extending back into his more active years. He has probably turned it over in his mind in all its aspects until his views on the subject have taken a definite and settled form which he has the power of communicating in an intelligent manner; when at the same time he would scarcely be able to drive a bargain or make a contract requiring that sharp clash of minds arising from greed, competition and adverse interests.

It frequently happens, also that the final testamentary act of an aged man is but a modification of a previous will, which was constructed in his more active years; sometimes it is the final fruit of a series of wills—and all these things must be taken into consideration.²² Each case of this kind must rest largely upon its own facts. The history,

²¹ *Kramer v. Weinert*, 81 Ala. 414, 1 South. 26; *Leeper v. Taylor*, 47 Ala. 221; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *Estate of Packer*, 164 Cal. 525, 129 Pac. 778.

²² *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Newton v. Carbery*, 5 Cranch, C. C. 626-629, Fed. Cas. No. 10,189.

mental characteristics and habits of the particular testator must be fully understood. General rules cannot be followed, but the testator's capacity at the time of making the will must be compared with his own powers at different periods of his life in order to arrive at a true estimate of his mental strength, rather than with the powers of other persons.²³

The capacity of a testator to engage in or understand any complicated matter or transaction is not a proper test of mental capacity to make a will. A man may be capable of making a will, and yet be incapable of making a contract or managing his estate.²⁴ But some courts have held that contracts

²³ *Knapp v. Trust Co.*, 199 Mo. 665, 98 S. W. 70; *Morgan v. Adams*, 29 App. D. C. 198.

²⁴ *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *Kischman v. Scott*, 166 Mo. 227, 65 S. W. 1031; *Wilson v. Jackson*, 167 Mo. 154, 66 S. W. 972; *Crowson v. Crowson*, 172 Mo. 702, 72 S. W. 1065; *Kinne v. Kinne*, 9 Conn. 105, 21 Am. Dec. 732; *Neel v. Powell*, 130 Ga. 756, 61 S. E. 729; *Owen v. Smith*, 91 Ga. 564, 18 S. E. 527; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *St. Leger's Appeal*, 34 Conn. 434-448, 91 Am. Dec. 735; *Lemon v. Jenkins*, 48 Ga. 313, 324; *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Wolfe v. Whitworth*, 170 Mo. App. 372, 156 S. W. 715.

Notice a few Missouri cases on this subject of senile dementia. In the bitterly contested case of *Harvey v. Sullens*, 46 Mo. 147, 2 Am. Rep. 491, the court instructed the jury as follows: "Where the deceased was, at the time of putting her mark to the paper propounded as a will, old and infirm in body and feeble and childish in mind, and incapable of transacting her ordinary business, then she had not sufficient capacity to make a will." This instruction was considered by the supreme court to be too broad a statement of the law, and as not following strictly the general rule as to the test of testamen-

and wills stand on the same footing as to mental capacity.²⁵

On the other hand it is necessary to give due weight to all the facts tending to show senile dementia. A recent discussion of the subject will be

tary capacity, but it was approved as not prejudicial in that particular case.

This same will came before the supreme court again in *Harvey v. Sullens*, 56 Mo. 372, where will be found an elaborate examination of many of the leading authorities American and English on this subject. Afterwards in the case of *Jackson v. Hardin*, 83 Mo. 175, the rule was brought into better form in the following language: "One who is capable of comprehending all his property and all the persons who reasonably come within the range of his bounty, and who has sufficient intelligence to understand his ordinary business and to know what disposition he is making of his property, has sufficient capacity to make a will; though one may be capable of making a will and yet be incapable of making a contract or managing his estate."

In the case of *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552, the will of a woman of eighty was sustained and Judge Black put the rule tersely thus: "A testator who knows that he is disposing of his property by will and to whom he is giving it, and the general nature and character of the property, is possessed of a sound and disposing mind."

And again he says in the case of *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807: "It does not follow because a person is advanced in years, or is suffering from some disease, that he is incapable of making a valid will. Such facts are, of course, to receive due consideration. But a person, though aged and infirm, who is able to transact his ordinary business affairs, and who has a mind and memory capable of presenting to him his property and those persons who come reasonably within the range of his bounty, has sufficient capacity to make a will. Though expressed in various words, such is the substance of the rule often asserted."

²⁵ *McElroy v. McElroy*, 5 Ala. 81; *Stewart v. Elliott*, 13 D. C. 307.

found in a luminous opinion by Judge Gantt in the Supreme court of Missouri, cited below.²⁶

§ 41. The effect of drink, drugs, etc.

Drunkenness, in its effect upon wills, is another form of mental unsoundness. The same is true of the opium and morphine habit, or the use of any other drugs or stimulants.²⁷ The mental disorder from these causes may be of two kinds, permanent or temporary.

In the great majority of cases the aberration is only temporary, and the presumption of the law is in favor of the validity of the will unless it be shown that it was executed under the immediate effect of the drunkenness or delirium. If the facts disclose a state of intoxication so great as to prevent the party from performing an intelligent act at the time when he executed the will, such evidence will, of course, defeat the testament. In order to have this effect, it must be shown that the unreasoning state of intoxication was at the very time of the testamentary act. Any previous intoxication cannot be presumed to have continued; nor can any subsequent inebriacy relate back to the execution of the will. Even habitual intoxication will not do.²⁸ The question to be put to the jury still re-

²⁶ *Roberts v. Bartlett*, 190 Mo. 696, 89 S. W. 858.

²⁷ *D'Avignon's Will*, 12 Colo. App. 489, 55 Pac. 936; *Naylor v. McRuer*, 248 Mo. 423, 154 S. W. 772.

²⁸ *Lang's Estate*, 65 Cal. 19, 2 Pac. 491; *Gharky's Estate*, 57 Cal. 274; *Johnson's Estate*, 57 Cal. 529; *Wilson's Estate*, 117 Cal. 276,

mains the same, "Was the testator *at the time* he executed the paper of sufficiently sound mind to understand the act in which he was engaged?"

It is often attempted to be shown that the intemperate habits have continued for so long a period as to effectually destroy the mental faculties and thus reduce the person to a state of lunacy or imbecility. While this state of affairs is possible, it has very rarely been shown.²⁹

49 Pac. 172; Archambault v. Blanchard, 198 Mo. 384, 95 S. W. 834; Schierbaum v. Schemme, 157 Mo. 7, 57 S. W. 526, 80 Am. St. Rep. 604; Truitt v. Truitt's Ex'r, 3 Pennewill (Del.) 311, 50 Atl. 174; Ball v. Kane, 1 Pennewill (Del.) 90, 39 Atl. 778; Duffield v. Morris' Ex'r, 2 Har. (Del.) 375.

²⁹ Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035; In re Estate of Van Alstine, 26 Utah, 193, 72 Pac. 942; Bensberg v. Wash. University, 251 Mo. 641, 158 S. W. 330.

The case of Gardner v. Gardner, 22 Wend. (N. Y.) 526, 34 Am. Dec. 340, was of this description, where it was said: "Proof of drunkenness amounting to insanity will invalidate a will, but if it be shown that the testator was not under the influence of strong liquors at the time of the execution, the presumption will be in favor of the will; a presumption strengthened or impaired, of course, by the internal evidence of the contents."

Another case on this subject is Bannister v. Jackson, 45 N. J. Eq. 702, 17 Atl. 692. "The proofs satisfy me that at the time the will was made Bannister had become addicted to the excessive use of intoxicating liquors, and that to some extent such indulgence had impaired both his mental and physical powers, and had probably contributed to the degradation of his moral character; but at the same time I am satisfied that the impairment of his mental faculties did not extend so far as to render him incompetent to perform a legal act when he was not under the immediate influence of intoxication. The test of testamentary capacity in this state is that the testator can comprehend the property he is about to dispose of, the objects of his bounty, the meaning of the business in which he is engaged, the relation of each of these factors to the others, and the distribution that is made by the will. The capacity required is mod-

§ 42. Lunacy—Its nature

A lunatic is one who has once had the use of his reason but has lost it. It was once supposed that lunacy was caused or controlled in some way by the moon, but we have learned to look elsewhere for its cause; and scientific men have made great progress in the direction of removing the cause and curing the disorder. Lunacy is usually a pronounced form of derangement and its symptoms are so marked as to be unmistakable. One afflicted with the most violent form of insanity we generally term a maniac. The incapacity of such a person to perform legal acts is so apparent to all who come into contact with him, that little difficulty is encountered in applying the law to these cases. A maniac is usually kept under close confinement, and is not permitted to have any part whatever in the management of his affairs. He is not permitted to make any contracts or any disposition of his property, and hence the will of such a person rarely comes in to question. As has been well said by Lord Cranworth:

There is no difficulty in the case of a raving maniac or a drivelling idiot in saying that he is not a person capable of disposing of property; but between such an extreme case and

erate, and, though the testator be subject to many infirmities, though he be feeble, absent-minded, forgetful, aged, diseased, blind or otherwise infirm, if he yet possess the powers required by this test, he will be held to have testamentary capacity."

Evidence of alcoholic dementia not sufficient. *Estate of Carithers*, 156 Cal. 422, 105 Pac. 127.

that of a person of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness, is hard to determine.³⁰

It is this middle ground between the sane and the insane which furnishes the difficult questions to determine on this branch of the subject. *Lunacy or insanity presupposes a sane and competent person who, for some cause, has suffered an impairment of his mental powers to such an extent that he has lost the capacity for voluntary, reasonable action.* Sometimes this impairment of the mind is a slow and gradual process, and months and sometimes years elapse before reason finally totters on her throne, never to resume sway again this side of the grave. At what precise point, therefore, does the capacity for the testamentary act cease? To answer that question an investigation must be made into the temperament, habits and mental traits of the individual and the nature and symptoms of his disorder. Comparison must be made with the individual himself, and not with others; that is to say, there must be some marked departure from his natural and normal state of feeling and thought, his habits and tastes, which is inexplicable, or is explained only by reference to some shock, moral or physical, or to a process of slow decay, showing

³⁰ Boyse v. Rossborough, 6 H. L. Cas. 2.

that his mind is becoming diseased or disordered.³¹ Perhaps it may be the influence of heredity, perhaps due to some physical disease or injury, perhaps some blow to his feelings or affections. If there can be said to be any general rule for the progress of a mind from sanity to insanity it is that the first stage is usually depression of spirits or despondency, the next stage is settled melancholy, then come periods of unnatural excitement, and finally acute mania. The intensity of these different stages and the fancies or delusions by which they are accompanied is the only guide to the capacity or incapacity of the individual at a particular time.

§ 43. Lunacy—lucid intervals

Another phenomenon of lunacy is that it is frequently, or indeed commonly, intermittent; that is, subject to periods of violence and repose. In some cases these are mere periods of excitement and depression and the person is equally insane at both times. What appears to be a calm repose is only a depression or stupor when exhausted nature is recuperating and preparing for another outburst. But sometimes they are really lucid intervals, when the mind seems to shine out brightly like the full

³¹ *Watson v. Anderson*, 11 Ala. 43; *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035.

Evidence of insanity. *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72.†

moon emerging from a cloud when the sky is partly overcast.

These lucid intervals have been the occasion of some question in the law of wills, but it is well settled that if a will be made during such a lucid interval, it is perfectly valid. There is no fixed rule as to the length of time such lucid interval must last; although the longer it lasts, the clearer the proof may be that it was really a sane and lucid period. Medical experts, indeed, deny that a person can be perfectly sane and capable in one of these limited intervals between two fits of insanity; but the law recognizes the capacity of such a person though his mind may not be perfectly restored to its normal functions.³²

Where a will is sought to be established of a person who appears to have been generally insane, or suffering from a chronic mental disorder, and it is claimed that the will was executed during a lucid interval, the burden of showing the existence of such lucid interval at the time of the execution of the document is upon those who propound the will.³³ The presumption of the law is against the

³² *Von de Veld v. Judy*, 143 Mo. 365, 44 S. W. 1117; *Darrell v. Brooke*, 2 Hayw. & H. (D. C.) 329, Fed. Cas. No. 18,287; *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *In re Estate of Ayers*, 84 Neb. 16, 120 N. W. 491.

³³ *King v. Gilson*, 191 Mo. 324, 90 S. W. 367; *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Duffield v. Morris' Ex'r*, 2 Har. (Del.) 375.

Testator may be mentally unsound when executing the original will and mentally sound when executing a codicil, three days after,

validity of the will of such a person, and the testator's capacity at the particular time must be shown in the clearest and most satisfactory manner.³⁴

which renders both instruments admissible to probate for the codicil republishes the will. *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294.

The condition of testator's mind at the time the will is made is the important thing. *Kinne v. Kinne*, 9 Conn. 105, 21 Am. Dec. 732; *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

³⁴ The case of *Macpherson's Will*, 1 Con. Sur. 223, 4 N. Y. Supp. 181, was a case of this character, where the court said:

"A will made in a lucid interval may be valid, but the facts establishing intelligent action must be shown. The nature and character of the instrument and its dispositions have great influence, and it is important to ascertain whether the contents of the will harmonize with the state of the decedent's affections and intentions otherwise expressed."

So in the English case of *White v. Driver*, 1 Phillimore Ecc. 84, the court said:

"The evidence in this case sufficiently establishes that the deceased had been at times subject to insanity for several years preceding her death, and even down to the 21st of January, 1805, only four days prior to the execution of the will in question; but it does not appear that the disorder was uniform, or always attacked her with an equal degree of violence. She was at large the greater part of her life and had the management and dominion of herself and her actions. She seems to have had violent accessions of the disorder in the years 1793-4, and in 1801 and again in 1804; the evidence, however, does not preclude the proof of lucid intervals, although it raises a strong presumption against sanity: for I agree with the counsel for the next of kin that wherever previous insanity is proved, the burden of proof is shifted, and it lies on those who set up the will to adduce satisfactory proof of sanity at the time the act was done.

"It is scarcely possible indeed to be too strongly impressed with the greater degree of caution necessary to be observed in examining the proof of a lucid interval; but the law recognizes acts done during such an interval as valid, and the law must not be defeated by any overstrained demands of the proof of the fact. In this case the

The will of a person who is admitted to be habitually insane may be valid if it be clearly shown to have been made during a lucid interval, or at a time when the mind is temporarily clear from the disorder which causes the insanity. In establishing the fact of a lucid interval the reasonableness of the will itself is a very important factor to be considered. If there is anything capricious or unreasonable about the will or any of its provisions, or even if it be harsh or contrary in any way to the natural and moral feelings and affections of the deceased, this throws great doubt upon the capacity of the testator. A perfectly sane person may make as capricious or as harsh a will as he chooses,

deceased had been subject not only to eccentricities, but to delusion and derangement at different periods for several years, but it was not continuous; she was not under confinement; she managed her own affairs; she earned her own livelihood; when she came out of the work-house on the 21st of January, she acted immediately and continued to act from that time till her death, as a sane and rational person. There is no indication of any fraud or circumvention in procuring this will; or even in suggesting it to her; a desire to make a will was not with her an insane topic; it is recommended very properly to her by the clergyman who was sent for to pray by her, and the intention of making it was first communicated by the deceased to an old acquaintance of hers by the name of Turner; the utmost possible precaution was used by Turner in carrying her wishes into effect, by securing the attendance of an attorney, two medical gentlemen and the clergyman.

"Notwithstanding, therefore, all the jealousy which the courts should feel as to the act of a person once proved to have been insane, still under this evidence it is impossible not to concur with these witnesses in opinion that the deceased was of sound mind; and consequently I am bound to pronounce for the validity of the will."

or may even make an unnatural or an unjust one, and the courts will not reform the will nor inquire into his motives.³⁵ But where the capacity of the testator is at all doubtful, the contents of the will become an important consideration; and we do not find that any wills have been sustained under these circumstances except the most natural and proper ones.

§ 44. Lunacy—Restoration to reason

If a lunatic, during a lucid interval may make a valid will, it follows, with all the more force that one who has once been insane, but who has been cured and restored to reason may make such a disposition. The previous insanity, even though it may, as it commonly does, leave the mind somewhat weakened and impaired from a medical standpoint, does not operate against the validity of the will if there is no connection between the insanity and the provisions of the will.³⁶

The presumption of the continuation of insanity depends upon the evidence of its permanent character.³⁷

An adjudication of insanity under the statutes, whereby the person is placed under legal guardianship, is regarded in some states as conclusive

³⁵ *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44; *Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 465.

³⁶ *Keely v. Moore*, 196 U. S. 38, 25 Sup. Ct. 169, 49 L. Ed. 376.

³⁷ *Nelson's Estate*, 132 Cal. 182, 64 Pac. 294.

evidence of want of capacity to make a will. In other states it is regarded as *prima facie* evidence only.³⁸

§ 45. Lunacy—Suicide

It may be said that suicide committed by the testator soon after making the will is not conclusive proof of insanity at the time the will was made. In fact it is not conclusive evidence of insanity at all; though this fact, in connection with other proof from which mental derangement might be inferred, is not to be ignored.³⁹

§ 46. Delirium from fever or disease

Having considered the effect of a lucid interval upon the will of a person otherwise insane, let us now take a glance at the other side of the question, and consider the effect of a temporary delirium or derangement upon a person otherwise sane. This is a very frequent state of affairs, for it unfortunately happens that persons postpone the making of their wills until they are on the bed of sickness and rapidly sinking from a fatal disease. Many

³⁸ *Johnson's Estate*, 57 Cal. 529.

An unsuccessful inquisition of lunacy is not conclusive. *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1.

An adjudication of insanity after making the will is not conclusive. *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

³⁹ Suicide is some evidence of insanity. *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130; *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035; *Duffield v. Morris' Ex'r*, 2 Har. (Del.) 375.

diseases bring on delirium, especially those which are accompanied by a high fever; and it is an unmistakable fact that this delirium, even though it may be brief and temporary and produce no lasting effects, nevertheless renders the patient for the time being just as much of unsound mind as though he was a raving maniac.⁴⁰

During the periods of delirium or unconsciousness the patient is to all intents and purposes insane, and hence incapable of making a valid will. But during the lucid intervals, his capacity is restored, and the mental state of the testator at any particular time is thus a question of fact, the decision of which controls the fate of the will.⁴¹

There are a great many physical diseases and calamities which may or may not produce an impairment of the mental powers according to their intensity and surrounding circumstances; such as paralysis, epilepsy, paresis, etc. As to these, it has been said that they cannot be presumed to have

⁴⁰ *Abel v. Hitt*, 30 Nev. 93, 93 Pac. 221.

⁴¹ If you desire to look at some Missouri cases illustrating this subject you will find one where there was delirium from pneumonia and fever in *Young v. Ridenbaugh*, 67 Mo. 574. Another case in which the will was set aside on the ground of pain and mental suffering is *Appleby v. Brock*, 76 Mo. 314. You will also find a case where the will was not set aside, though the testator was suffering from great pain and had been delirious the night before, in *Odenwaelder v. Schorr*, 8 Mo. App. 458. See, also, *Crossan v. Crossan*, 169 Mo. 634, 70 S. W. 136; *Beyer v. Hermann*, 173 Mo. 295, 73 S. W. 164.

Will set aside by reason of mental weakness caused by fever and disease. *Goodfellow v. Shannon*, 197 Mo. 271, 94 S. W. 979; *Jamison v. Jamison's Will*, 3 Houst. (Del.) 108.

impaired the mind or destroyed the testamentary capacity of the deceased, but if such has been their effect it must be shown. As said by Justice Washington:

If no actual derangement or mental imbecility be found, it is not sufficient, *per se*, to assign a cause of derangement which might or might not have produced that effect. Paralysis, for instance, is sometimes a cause of mental derangement, and frequently it is not. If attended by apoplexy or an affection of the nerves, it necessarily affects the mind; but it frequently affects only the muscles, thereby producing bodily infirmity alone and leaving the mind unimpaired. If the patient survives the stroke for any considerable length of time, it may in general be concluded that it was simply a paralysis affecting the body only.⁴²

§ 47. Drugs administered for fever or pain

It frequently happens also that the disease under which the patient is suffering requires the administration to him of very powerful drugs or stimulants, and these produce in him a temporary, artificial delirium or stupor, which has all the effect of destroying testamentary capacity by preventing a free and deliberate exercise of his mental faculties. The practice of giving these opiates to persons in a dangerous state of illness seems to be on the increase among medical men; and it is a difficulty with which the draftsman of a will will often have

⁴² Hoge v. Fisher, 1 Pet. C. C. 163, Fed. Cas. No. 6,585.

Apoplexy. Steele v. Helm, 2 Marv. (Del.) 237, 43 Atl. 153.

Paralysis. Credille v. Credille, 131 Ga. 40, 61 S. E. 1042.

Epilepsy. Wood v. Carpenter, 166 Mo. 486, 66 S. W. 172; Turner v. Anderson, 236 Mo. 523, 139 S. W. 180.

to contend. A certain amount of opiate or stimulant may have the effect of clearing one's mind, by relieving him from pain and torture, and enabling him to fix his attention calmly and deliberately upon the subject of the final disposition of his property; while a greater amount might drive him into delirium or stupor. The mere fact of a drug having been administered is no proof either for or against the validity of the will, but in cases of this kind, the caution exercised in preserving the proper evidence of the testator's condition cannot be too great.⁴³

In a case of this kind the court has said:

In the case of a will made upon a death bed and shortly before death where stupor from drugs or delirium is shown, we know of no presumption that the will was made during a lucid interval, where the intervals are shown to have existed.⁴⁴

§ 48. Monomania or partial insanity

All the various types of mental unsoundness which we have thus far been considering have this feature in common, that they operate to suspend mental capacity totally for the time being; and the material issue in cases arising under them is whether the testator was or was not of sound mind at

⁴³ The influence of morphine or opiates does not render one mentally incapable of making a will regardless of the degree of the influence. *Whitsett v. Belue*, 172 Ala. 256, 54 South. 677.

Drugs. *Von de Veld v. Judy*, 143 Mo. 364, 44 S. W. 1117; *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227.

Medicines. *Stedham v. Stedham's Ex'rs*, 32 Ala. 525.

⁴⁴ *Elliott v. Welby*, 13 Mo. App. 27.

the time he did the act. But there is another class of cases in which the testator may be admitted to be of sound mind to all general intents and purposes, and yet may be held to be incapable of making the particular will in question. These are cases of partial insanity, or what are called insane delusions. Medical experts are not yet agreed that there can be such a thing as partial insanity; that is, that the mind can be sound on some subjects and unsound on others. They argue that the mind is an indivisible unit, and that if it is affected in one part, it is unsound, and cannot be considered a sound mind in any particular. But every day experience demonstrates that there are very many persons who are possessed of insane delusions upon particular topics. Upon all other subjects these persons display shrewd, sound common sense; they are frequently possessed of great skill or talent in their business; they are able to manage their own affairs; are the match for their neighbors in the business world, and amass large fortunes; and yet when approached upon the particular subject of their monomania they are absolutely and unmistakably insane.

This doctrine of monomania, or partial insanity, is well settled in the law, and if it is shown to exist, it will have its effect upon the will of such person; in fact, it is in the field of will contests that the subject of monomania has developed. If the mono-

mania is connected with the disposition of property or with the particular disposition pointed out by the will, it invalidates the will as not being the product of a sound mind.⁴⁵ But if the monomania is not connected with the will and had no influence upon it then the will may stand.⁴⁶

§ 49. Monomania—Distinguished from eccentricity, moral perversion or bad temper

Monomania, or partial insanity, usually consists of insane delusions on particular subjects. It is in this particular that it differs from eccentricity or mere oddness of disposition and character.⁴⁷ A man may be as eccentric and odd as possible and may make a very odd and fanciful will, without being a particle crazy. Eccentricity simply means a defiance of public opinion and a refusal to conform to established usages in certain matters. It is sometimes the mark of a strong and original mind, but sometimes, and more often it is the result of

⁴⁵ *Florey v. Florey*, 24 Ala. 241; *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329.

⁴⁶ *In re Redfield*, 116 Cal. 653, 48 Pac. 794; *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461; *Dunham's Appeal*, 27 Conn. 192-201; *Darrell v. Brooke*, 2 Hayw. & H. (D. C.) 329, Fed. Cas. No. 18,287; *Gardner v. Lamback*, 47 Ga. 133; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Denson v. Beazley*, 34 Tex. 191; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

⁴⁷ *Fulbright v. Perry Co.*, 145 Mo. 436, 46 S. W. 955; *Wilson v. Jackson*, 167 Mo. 155, 66 S. W. 972; *Sayre v. Trustees*, 192 Mo. 123, 90 S. W. 787; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *Hine's Appeal*, 68 Conn. 551-557, 37 Atl. 384; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501.

surroundings, and of a retirement from active contact with the world.

Neither is monomania to be confused with moral perversion. A man may be very degraded morally and may have lost all natural impulses and affections, and this degradation may appear in the terms of his will, without his being said to be insane. As said in an instruction approved by the supreme court of Missouri:

If the jury find that the testator was, at the time of the execution of the will, laboring under moral insanity, or a perversion of the moral feelings, this cannot affect the validity of the will, unless the jury are satisfied that said moral insanity was accompanied by an insane delusion, and that the will was the offspring of such delusion.⁴⁸

A mere mistake of fact is not an insane delusion,⁴⁹ nor a mistaken opinion,⁵⁰ nor a mistaken no-

⁴⁸ *McClintock v. Curd*, 32 Mo. 411; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Bohler v. Hicks*, 120 Ga. 800, 48 S. E. 306.

⁴⁹ *Hall's Heirs v. Hall's Ex'r*, 38 Ala. 131; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Jackson v. Hardin*, 83 Mo. 183; *Sayre v. Trustees*, 192 Mo. 126, 90 S. W. 787.

The mere fact that a testator disclaimed the paternity of children born of his marriage, and disinherited them, carries no presumption that he was suffering from an insane delusion. If his belief was founded upon a mistake of fact or false testimony it is not an insane delusion. But if he retained the belief when under the conditions shown every sane mind would reject or surrender it, it may be classed as a delusion. *Morgan v. Morgan*, 30 App. D. C. 436, 13 Ann. Cas. 1037.

⁵⁰ *Fulton v. Freeland*, 219 Mo. 494, 118 S. W. 12, 134 Am. St. Rep. 576; *Conner v. Skaggs*, 213 Mo. 334, 111 S. W. 1132.

No belief that has any evidence for its basis is an insane delusion. *Stull v. Stull*, 1 Neb. (Unof.) 389, 96 N. W. 196.

tion on the part of the testator as to the feelings or intentions of his relatives.⁵¹ The same may be said of suspicions,⁵² arbitrary and capricious likes and dislikes,⁵³ prejudices, resentments and aversions, well or illfounded, for heirs and relatives,⁵⁴ or high temper,⁵⁵ unkindness or brutality.⁵⁶ But it is said that unexplainable aversion to a child may be an insane delusion.⁵⁷

§ 50. Insane delusion—Must affect the will

An insane delusion must exist which has some direct influence upon the will, or which caused it to be made in the particular form in which it was made; otherwise the will is valid.

An insane delusion is said to consist essentially in believing that to be true or to exist which no man in his senses can admit. The standard of com-

⁵¹ *McBride v. Sullivan*, 155 Ala. 166, 45 South. 902; *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101; *In re Ruffino*, 116 Cal. 317, 48 Pac. 127.

⁵² *Estate of Scott*, 128 Cal. 57, 60 Pac. 527; *Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605; *Calef's Estate*, 139 Cal. 673, 73 Pac. 539.

⁵³ *Spencer's Estate*, 96 Cal. 452, 31 Pac. 453.

⁵⁴ *Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605; *Dunham's Appeal*, 27 Conn. 192; *Robinson v. Duvall*, 27 App. D. C. 535; *Riddle v. Gibson*, 29 App. D. C. 237; *Carter v. Dixon*, 69 Ga. 82; *Wynne v. Harrell*, 133 Ga. 616, 66 S. E. 921; *In re Clapham's Estate*, 73 Neb. 492, 103 N. W. 61; *Estate of Riordan*, 13 Cal. App. 313, 109 Pac. 629.

⁵⁵ *Current v. Current*, 244 Mo. 429, 148 S. W. 860.

⁵⁶ *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44.

⁵⁷ *Buford v. Gruber*, 223 Mo. 231, 122 S. W. 717; *Estate of Riordan*, 13 Cal. App. 313, 109 Pac. 629.

parison being the average man with the average range of mind.⁵⁸

The case of *Benoist v. Murrin*, 58 Mo. 307, is often cited by other courts and text writers as laying down with great clearness the rule of law upon this subject. The court said:

Whenever a person imagines something extravagant to exist, which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane; and if his delirium relates to his property, then he is incapable of making a will. But to invalidate the instrument it must be directly produced by the partial insanity or monomania under which the testator was laboring.⁵⁹

⁵⁸ The case of *Cutler v. Zollinger*, 117 Mo. 92, 22 S. W. 895, was a case of a sale of real estate which the plaintiff endeavored to have set aside on the ground that she was under an insane delusion at the time it was made. It was shown that she believed herself tormented by devils, but Judge Black held that this had nothing to do with her property, and refused to set the deed aside, inasmuch as a fair price had been paid by the purchaser.

A late case on this subject is the case of *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 926, where it was claimed that the testator had an unnatural and insane dislike for his wife and children. He had received a blow on his head about twenty-four years before his death. In 1886, a year or so before his death, he had shot and killed one of his sons in a fight, after having been shot by the son four or five times. After these events he became of a morbid and restless frame of mind. By the will in question he had devised all of his property to one of his daughters to the exclusion of his other sons and daughters, subject however to a life estate of his wife in one-third. The will was drawn by a leading attorney, and there seemed to be no question of the testator's general capacity. The will was therefore sustained.

⁵⁹ *Paranoia*, partial insanity or insane delusions defined. *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; *Knapp v. Trust Co.*, 199 Mo. 667, 98 S. W. 70;

In this particular case it was claimed that the testator was under an insane delusion that his son had ruined him and that he was a pauper. He left a will by which he disposed of an estate worth a million and a half dollars, and the will was sustained.

While an unnatural or unreasonable will is not of itself sufficient to show want of mental capacity it may be corroborative evidence of delusions.⁶⁰

Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035; Conner v. Skaggs, 213 Mo. 334, 111 S. W. 1132; Buford v. Gruber, 223 Mo. 231, 122 S. W. 717; Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101; Riddle v. Gibson, 29 App. D. C. 237; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; Evans v. Arnold, 52 Ga. 169; Wetter v. Habersham, 60 Ga. 193; Prather v. McClelland, 76 Tex. 574, 18 S. W. 543.

Instructions on insane delusions. McKenna's Estate, 143 Cal. 580, 77 Pac. 461.

Improper instruction on insane delusions. Carpenter v. Bailey, 94 Cal. 406, 29 Pac. 1101.

A delusion shown to exist is presumed to continue. Buford v. Gruber, 223 Mo. 231, 122 S. W. 717.

Insane delusion implies that testator knows what he is doing, but has an insane reason for doing it. Harbison v. Beets, 84 Kan. 11-18, 113 Pac. 423.

⁶⁰ Wilson's Estate, 117 Cal. 278, 49 Pac. 172.

§ 51. Insane delusion—Spiritualism and other religious beliefs

The belief in Spiritualism, that is, that the spirits of the dead can communicate with the living, and advise, suggest, approve, or disapprove their action in particular cases, is not per se an insane delusion,⁶¹ but such a belief may easily lend itself to

⁶¹ Spencer's Estate, 96 Cal. 448, 31 Pac. 453; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473; Smith's Will, 52 Wis. 543, 8 N. W. 616, 9 N. W. 665, 38 Am. Rep. 756; Billings' Appeal, 49 Conn. 461; McClary v. Stull, 44 Neb. 175, 62 N. W. 501.

A belief in spiritualism does not incapacitate from making a valid will, even when the testator acted under supposed instructions from departed spirits, unless absolute unsoundness of mind is found. Brown v. Ward, 53 Md. 376, 36 Am. Rep. 422; Robinson v. Adams, 62 Me. 369, 16 Am. Rep. 473.

A striking case on this subject is found in *Middleditch v. Williams*, 45 N. J. Eq. 726, 17 Atl. 826, 4 L. R. A. 738, where the court said:

"A will may be contrary to the principles of justice and humanity, its provisions may be shockingly unnatural and extremely unjust; nevertheless, if it appears to have been made by a person of sufficient age to be competent to make a will, and also to be the free and unconstrained product of a sound mind, the courts are bound to uphold it.

"Even if it appears that the testator was subject to an insane delusion when he made his will, but it is also made to appear that his delusion was not of a character likely to influence him, and did not influence him, in the disposition which he made of his property, his will should be declared valid.

"The testator was a believer in spiritualism; that is, he believed the spirits of the dead can communicate with the living, through the agency of persons called mediums and who possess qualities or gifts not possessed by mankind in general. The proofs show that the testator stated to several persons prior to the execution of his will that the spirit of his dead wife had requested him, through a medium residing in Forty-sixth street in the city of New York, to make provision for his mother-in-law in his will. To one person he said that

case of actual fraud or undue influence.⁶² Spiritualism is classed with other religious beliefs. A belief common to all the members of a particular religious sect, such as the belief in purgatory, is not an insane delusion.⁶³

his wife's spirit had requested him to give all his property to her mother and to do it in such a way that none of his relatives could get it away from her. The evidence shows beyond doubt, I think, that the testator believed fully and thoroughly that the messages which were delivered to him, as communications from his wife, actually came from her spirit, and that her spirit knew constantly all that he was doing."

The testator did make very liberal provision for his mother-in-law, to the exclusion of all of his relatives except his niece, but the will was sustained on the ground that the only proof of any insanity was this belief in spiritualism. The court would not say as a matter of law that a belief in spiritualism was an insane delusion.

⁶² *Thompson v. Hawks* (C. C.) 14 Fed. 902; *Lyon v. Home*, L. R. 6 Eq. 655; *Gass v. Gass*, 3 Humph. (Tenn.) 278; *Weir's Will*, 9 Dana (Ky.) 34.

⁶³ *Newton v. Carbery*, 5 Cranch, C. C. (D. C.) 626, Fed. Cas. No. 10,189.

Other peculiar religious beliefs. *Bonard's Will*, 16 Abb. Prac. N. S. (N. Y.) 128; *Austen v. Graham*, 1 Spinks (Eng. Ecc.) 357.

CHAPTER V

PROBATE OF WILLS

- § 52. Necessity for probate.
- 53. Common law method of probate.
- 54. Rights under an unprobated will.
- 55. Ecclesiastical courts superseded by probate courts with broader powers.
- 56. Equity has no jurisdiction to probate or cancel wills.
- 57. Place of probate.
- 58. Preliminary fact of death.
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- 60. Manner of probate—On notice and hearing.
- 61. Probate—Procedure.
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- 63. Lost or destroyed wills.
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- 65. Recording will as a conveyance.

EFFECT OF PROBATE

- 66. Under American statutes.
- 67. Difference between proceeding in rem and in personam.
- 68. Decree of probate not subject to collateral attack.

§ 52. Necessity for probate

When a person dies leaving a last will and testament, or an instrument which is claimed to bear that character, the question at once arises in what manner may the validity of such instrument be established so as to make it binding upon all persons interested in the estate and effective upon the property of which it seeks to dispose. A will is in the nature of a conveyance of title to property, and in

order to have this effect, certain preliminary steps must be taken. A conveyance of title by act *inter vivos*, such as a deed, takes effect from the moment of delivery; but inasmuch as a will cannot be delivered, some other mode must be taken to put it into operation.

Whether there is in existence a valid will, that is, an instrument testamentary in character, and executed in conformity with law, is a mixed question of law and fact which should be submitted to and passed upon by some tribunal of proper jurisdiction. The nature of the instrument itself, the formalities which the law requires to make it valid, the fact that the maker whose will it expresses is silent in death, the fact that it alters the law of descent and establishes a new law for that particular estate, the rights of heirs and the contingent interest of the state itself in the property, all coincide in producing an imperative public policy that the proof of the existence and validity of a will shall not be left in the breast of interested parties, but shall be submitted to a public tribunal with power to hear, determine and establish. The power is essentially judicial, and may be conferred by statute upon any court capable of exercising it. It is usually reposed in probate courts, or courts of that general nature. The American law now generally recognizes the necessity for the probate of wills, both of real and personal property, makes provision for their probate in the same tribunal,

and refuses to recognize in other tribunals the terms or legality, of an unprobated will. Even attempts by provisions in the will, commonly called non-probate clauses, to dispense with the necessity for probate or administration are fruitless.¹

§ 53. Common law method of probate

This is a marked departure from the common law as we have received it from England. At common law no probate of a will of real estate was known. There was no tribunal empowered to pass finally upon the validity or invalidity of such a will. It was regarded as a conveyance, and in case of litigation was proved like any other conveyance. A will of personal estate was, however, proved in the ecclesiastical court. This probate had the salutary effect of establishing the existence of the will by public record, but it was not originally designed for that purpose. It arose from the circumstance that by the early rules of the common law the bishop claimed title to all the personal effects of an intestate. When a person left a will the title to the personalty vested in the executor and not in the bishop. The executor therefore proved or *pro-*

¹ Sharp v. Hall, 86 Ala. 110, 5 South. 497, 11 Am. St. Rep. 28; Southworth v. Southworth, 173 Mo. 59, 73 S. W. 129; Sevier v. Woodson, 205 Mo. 202, 104 S. W. 1, 120 Am. St. Rep. 728.

Attempts to pass the estate direct to trustees without the intervention of executors or administrators are void. Hunter v. Bryson, 5 Gill & J. (Md.) 483-488, 25 Am. Dec. 313; Wall v. Bissell, 125 U. S. 382-388, 8 Sup. Ct. 979, 31 L. Ed. 772.

bated the will in the ecclesiastical court not for the purpose of submitting the estate to the control of that court, but for the very purpose of ousting the bishop of the claim of control that he otherwise would have had. The best résumé of the common law on this subject is found in a California case.

In England, the probate of wills of personal estate belongs to the ecclesiastical courts. No probate of a will relating to real estate is there necessary. The real estate, upon the death of the party seized, passes immediately to the devisee under the will, if there be one, or if there be no will, to the heirs at law. The person who thus becomes entitled takes possession. If one person claims to be the owner under a will, and another denies the validity of the will and claims to be the owner as heir at law, an action of ejectment is brought against the party who may be in possession by the adverse claimant; and on the trial of such an action, the validity of the will is contested, and evidence may be given by the respective parties as to the capacity of the testator to make a will, or as to any fraud practiced upon him, or as to the actual execution of it, or as to any other circumstances affecting its character as a valid devise of the real estate in dispute. The decision upon the validity of the will in such action becomes *res judicata*, and is binding and conclusive upon the parties to that action and upon any person who may subsequently acquire the title from either of those parties; but the decision has no effect upon other parties, and does not settle what may be called the "status" or character of the will, leaving it subject to be enforced as a valid will, or defeated as invalid, whenever other parties may have a contest depending upon it. A probate of a will of personal property, on the contrary, is a judicial determination of the character of the will itself. It does not necessarily or ordinarily arise from any controversy between adverse claimants, but is necessary in order to authorize a disposition of the personal estate in pursuance of its provisions. In case of any controversy between adverse claimants of the

personal estate, the probate is given in evidence and is binding upon the parties, who are not at liberty to introduce any other evidence as to the validity of the will.²

By the common law therefore a will of personal property must be probated in the ecclesiastical courts,³ but no provision was made for a probate of wills of realty and no particular effect attached to such probate if it occurred. A will of lands, to operate as a conveyance, was proved in the suit by proof of signature like any other conveyance.⁴ In the absence of a statute there is no necessity for the probate of a will of lands.⁵ The statutes of most of the American states have made an express requirement that wills of land as well as personalty shall be probated.⁶ A proper tribunal is established

² *State v. McGlynn*, 20 Cal. 233-265, 81 Am. Dec. 118; *Ward v. Co. Com'rs*, 12 Okl. 267-274, 70 Pac. 378.

The object of probate is to establish the existence and genuineness of the will. *March v. Huyter*, 50 Tex. 243.

If a party has a legal right to have a will probated, the motives which actuate him are immaterial. *St. Mary's O. A. v. Masterson*, 57 Tex. Civ. App. 646, 122 S. W. 587.

³ *Armstrong v. Lear*, 12 Wheat. 169, 6 L. Ed. 589.

⁴ *Campbell v. Porter*, 162 U. S. 485, 16 Sup. Ct. 871, 40 L. Ed. 1044; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; *Campbell v. Garven*, 5 Ark. 485; *Janes v. Williams*, 31 Ark. 175-181; *Arrington v. McLemore*, 33 Ark. 759-761; *Young v. Norris Peters Co.*, 27 App. D. C. 140.

⁵ *Adams v. Norris*, 23 How. 353, 16 L. Ed. 539; *Smyth v. N. O. C. & B. Co.*, 93 Fed. 899, 35 C. C. A. 646.

⁶ *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Hall v. Hall*, 47 Ala. 290; *Brock v. Frank*, 51 Ala. 85; *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; *Sperber v. Balster*, 66 Ga. 317; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Gains v. Chew*, 2 How. 619, 11 L. Ed. 402; *Case*

or designated for that purpose, and the jurisdiction which is conferred upon it to pass upon applications for probate in the first instance is usually exclusive.

§ 54. Rights under an unprobated will

This is a very necessary provision and has received, as it should, the most liberal aid from the courts, in carrying out its policy. Neither the powers of the executor ⁷ nor the title of the devisees or legatees ⁸ are recognized in any action unless the will has been probated. But when probated the

of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599; *Campbell v. Porter*, 162 U. S. 478, 16 Sup. Ct. 871, 40 L. Ed. 1044.

⁷ *Brock v. Frank*, 51 Ala. 85; *Sloan v. Frothingham*, 65 Ala. 593; *Johnes v. Jackson*, 67 Conn. 81, 34 Atl. 709.

⁸ *Shepherd v. Nabors*, 6 Ala. 631; *Moore v. Lewis*, 21 Ala. 580; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Hawkin's Adm'r v. Dumas*, 41 Ala. 391; *Daniel v. Hill*, 52 Ala. 430; *Jordan v. Jordan*, 65 Ala. 301; *Desribes v. Wilmer*, 69 Ala. 25, 44 Am. Rep. 501; *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Travick v. Davis*, 85 Ala. 342, 5 South. 83; *Crow v. Powers*, 19 Ark. 424; *Carpentier v. Gardiner*, 29 Cal. 160; *Castro v. Richardson*, 18 Cal. 478; *Turner v. McDonald*, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189; *Meegan v. Boyle*, 19 How. 130, 15 L. Ed. 577; *McClaskey v. Barr* (C. C.) 54 Fed. 781; *Thomason v. Driskell*, 13 Ga. 253; *Baldwin v. Wylie*, 2 Hayw. & H. (D. C.) 126, Fed. Cas. No. 18,228; *Fitzgerald v. Wynne*, 1 App. D. C. 107; *Bryan v. Walton*, 14 Ga. 185; *New v. Nichols*, 73 Ga. 143; *Alabama G. S. Ry. v. Redding*, 112 Ga. 62, 37 S. E. 91; *Albany F. Co. v. James*, 112 Ga. 450, 37 S. E. 707; *Harrell v. Harrell*, 123 Ga. 267, 51 S. E. 283; *Equitable L. & S. Co. v. Lewman*, 124 Ga. 190, 52 S. E. 599, 3 L. R. A. (N. S.) 879; *Murray v. McGuire*, 129 Ga. 269, 58 S. E. 841; *Hartwell v. Parks*, 240 Mo. 537-550, 144 S. W. 793; *Farris v. Burchard*, 242 Mo. 1, 145 S. W. 825; *Lake v. Hood*, 35 Tex. Civ. App. 32, 79 S. W. 323; *Murphy v. Welder*, 58 Tex. 235; *Ochoa v. Miller*, 59 Tex. 460; *Moursund v. Priess*, 84 Tex. 554, 19 S. W. 775;

powers and the titles relate back to the death of the testator. Hence the will may be probated even after the bringing of a suit in which it is to be used as evidence of title.⁹ It seems that voluntary partitions and divisions may be had between devisees or legatees before probate.¹⁰ But this is a highly inconvenient and dangerous form of procedure, as it leaves out of view the rights of others who might want to defeat the will, as well as the claims of creditors whose only opportunity to prove their debts is in the administration following probate. Those who claim under an unprobated will do so at their own peril.¹¹ In the absence of proof of a will the presumption is that the deceased died in-

Horton v. Garrison, 1 Tex. Civ. App. 31, 20 S. W. 773; *Pettit v. Black*, 13 Neb. 142, 12 N. W. 841.

A will is not admissible in evidence as such until shown to have been duly probated.

Presumption of probate of an ancient will will not obtain until it be shown that the records of the proper court for its probate are lost or destroyed. *Lagow v. Glover*, 77 Tex. 448, 14 S. W. 141.

⁹ *White v. Keller*, 68 Fed. 796, 15 C. C. A. 683; *Poole v. Fleeger*, 11 Pet. 185, 9 L. Ed. 680; *Barnard v. Bateman*, 76 Mo. 414; *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478, 69 Am. St. Rep. 615.

Northrop v. Columbian Lbr. Co., 186 Fed. 770, 108 C. C. A. 640; *Northrop v. Troup*, 195 Fed. 262, 115 C. C. A. 218.

Title to land passes to the devisee upon the death of the testator; the probate of the will is but a legal formality required to give evidence and effect to that right. *Haney v. Gartin*, 51 Tex. Civ. App. 577, 113 S. W. 166; *Ryan v. T. P. Ry.*, 64 Tex. 239.

¹⁰ *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

¹¹ *Wilson v. Wilson*, 54 Mo. 215; *Watson v. Alderson*, 146 Mo. 333, 48 S. W. 478, 69 Am. St. Rep. 615.

But an unprobated will may be color of title to found adverse pos-

testate.¹² Until a will is produced that breaks the course of descent of realty the presumption is that the realty goes where the law casts it.¹³

§ 55. Ecclesiastical courts superseded by probate courts with broader powers

The establishment or rejection of a will is a judicial question involving the decision of facts and the application of the law thereto.¹⁴ In this country we began without ecclesiastical courts, and it became necessary to erect statutory courts and to confer upon them the powers in these matters formerly exercised by the spiritual courts. Our probate courts, therefore, while they are classed as courts of record, are courts of limited jurisdiction; wholly of statutory origin and having no powers but those given to them by the statute of their creation,¹⁵ and yet in matters of practice they regard in great measure the precedents of the old English

session. *Pettit v. Black*, 13 Neb. 142-152, 12 N. W. 841; *Illg v. Garcia*, 92 Tex. 251, 47 S. W. 717; *Scoby v. Sweatt*, 28 Tex. 713-728.

A sale by a devisee of an interest held under a will and before its probate passes title. A subsequent probate by citation would give vitality to such a conveyance, except as against an innocent purchaser from an heir. *March v. Huyter*, 50 Tex. 243.

A purchaser in good faith of land from a legatee, under a will duly admitted to probate, is not affected by proceedings subsequently instituted and resulting in annulling the will as a forgery. *Steele v. Renn*, 50 Tex. 467, 32 Am. Rep. 605.

¹² *Adams v. Phillips*, 132 Ga. 455, 64 S. E. 467.

¹³ *Miller v. Speight*, 61 Ga. 460.

¹⁴ *Snuffer v. Howerton*, 124 Mo. 637, 28 S. W. 166.

¹⁵ *Elliott v. Wilson*, 27 Mo. App. 218.

ecclesiastical courts. Their chief functions are to supervise the administration of the estates of deceased persons, and this includes the power to take proof of last wills. Their powers cannot be enlarged by the terms of the will,¹⁶ any more than they can be restricted. They are usually given exclusive original jurisdiction in the probate of wills.¹⁷ Theirs is a judicial power, to be exercised in a judicial manner and not by a mere ministerial officer. Although sometimes the statutes permit the judge or clerk in vacation temporarily or provisionally to admit the will to probate such action must be confirmed by the court in term time.

Under the laws of most of the states of the Union the probate courts have been given jurisdiction of both real and personal property of a decedent, and the decisions are uniformly to the effect that where such jurisdiction is given to probate courts, their decrees establishing a will of realty are as conclusive as the decrees of the ecclesiastical courts

¹⁶ *Pres. Church v. McElhinney*, 61 Mo. 540.

¹⁷ *Banks v. Banks*, 65 Mo. 432; *Stowe v. Stowe*, 140 Mo. 594, 41 S. W. 951; *Johnes v. Jackson*, 67 Conn. 81-90, 34 Atl. 709; *Loosemore v. Smith*, 12 Neb. 343, 11 N. W. 493 (1882); *In re Jackman*, 26 Wis. 104; *Byron Reed Co. v. Klabunde*, 76 Neb. 801, 108 N. W. 133; *Andersen v. Andersen*, 69 Neb. 565, 96 N. W. 276; *Williams v. Miles*, 63 Neb. 859, 89 N. W. 451; *Larson v. How*, 71 Minn. 250, 73 N. W. 966; *In re Hause*, 32 Minn. 155-157, 19 N. W. 973; *Campbell v. Logan*, 2 Brad. Sur. (N. Y.) 90; *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147; *Hotchkiss v. Ladd's Est.*, 62 Vt. 209, 19 Atl. 638; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213; *Brown v. Webster*, 87 Neb. 788, 128 N. W. 635; *Franks v. Chapman*, 60 Tex. 46.

of England in regard to personal property.¹⁸ Although there are many minor differences of form and procedure in the probate courts of the various states, the general plan and the underlying principles of their action are strikingly similar.

§ 56. Equity has no jurisdiction to probate or cancel wills

Courts of equity have never had any jurisdiction to admit wills to probate, or to establish a will which had been rejected by the ecclesiastical court.¹⁹ Frequent appeals have been made, however, to equity to set aside, annul or cancel wills on the ground of fraud. Such appeals have almost always been in vain. The rule has been as well settled as any rule can be in this branch of the law that "Equity has jurisdiction of all cases of fraud except fraud in procuring a will."

The California case referred to,²⁰ after describing the difference between proving wills of real and wills of personal property in England, continues:

¹⁸ *Ward v. County Com'rs*, 12 Okl. 267-274, 70 Pac. 378.

¹⁹ *McDaniel v. Pattison*, 98 Cal. 86, 27 Pac. 651, 32 Pac. 805; *Erwin v. Hammer*, 27 Ala. 296; *Robson v. Robson's Adm'r*, 3 Del. Ch. 51; *Ormsby v. Webb*, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507 (Cal.).

Such power over probate as is conferred on Chancery courts is by statute. *Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513.

In one case it was determined that equity would aid where the will was fraudulently destroyed. *Harris v. Tisereau*, 52 Ga. 153, 21 Am. Rep. 242.

²⁰ *State v. McGlynn*, 20 Cal. 233, 265, 81 Am. Dec. 118.

In this condition of the law as to the mode of proving wills in England, a vast number of cases have arisen, in which applications have been made to the court of chancery to set aside wills upon the ground that they were obtained by fraud. These applications have been made upon the maxim that fraud is a peculiar object of chancery jurisdiction, and the detection and defeating of it one of the special objects for which courts of chancery were established. But in these cases the relief sought has been uniformly denied, for the reason that the court of chancery has no power to determine the validity of a will. However comprehensive the jurisdiction may be to set aside other fraudulent instruments, all control over wills has been disavowed by the court of chancery. The reason assigned as respects wills of personal property is that the subject belongs exclusively to the ecclesiastical courts, which courts are alone competent to decide upon their validity, as well where that depends upon a question of fraud as upon any other ground. *Archer v. Masse*, 2 Vernon, 8; *Allen v. Dundas*, 3 D. & East, 131; *Gingell v. Horne*, 9 Simon, 539. As respects wills of real estate, the reason assigned in some cases is that there is a remedy at law; in others it is said, generally, that the court of chancery has no jurisdiction to determine the validity of a will. *Kerrick v. Bransby*, 7 Brown's Cas. in Pat. 437; *Jones v. Jones*, 7 Price Ex. R. 663; *Jones v. Frost*, Jacobs, 466; *Pemberton v. Pemberton*, 13 Ves. 290. As the reason that the ecclesiastical courts have exclusive jurisdiction does not apply to wills of real estate, and as the reason that there is a remedy at law applies equally to other instruments over which courts of chancery exercise jurisdiction to set them aside for fraud, it has been said that the reasons assigned by the courts of chancery for declining to take jurisdiction in cases of wills of real estate alleged to be obtained by fraud are not satisfactory. But notwithstanding this objection to the sufficiency of the reasons assigned, the fact that the jurisdiction does not exist has been constantly asserted through a long line of decisions, and is as firmly established as any other principle in regard to chancery jurisdiction.

Courts of chancery, in their efforts to defeat fraudulent

practices, have in some cases deprived parties of the benefit of the fraudulent will by decreeing that such parties shall hold the property under the will in trust for the parties who would have been entitled to it if such will had not been probated. In such cases, however, they have disclaimed any power to set aside the will or the probate, and the resort to this circuitous mode of defeating a fraud but the more clearly evinces how firmly the principle is fixed, that they have no power to act directly upon the subject. In one case, (*Barnesly v. Powell*, 1 Ves. Sen. 284) the court decreed the party claiming under a probated will to go into the probate court and consent to the probate being set aside. It claimed to do this upon the ground that the probate was obtained by virtue of a deed of proxy fraudulently procured; and as the court of chancery had the power to set that deed aside, it would leave the probate without any foundation. At the same time that this novel proceeding was adopted, the court say it will be done "without interfering with any jurisdiction." This is the only case, so far as we are aware, since the decision in the case of *Kerrick v. Bransby*, in the year 1727, in which a probate has been avoided even indirectly by the aid of a court of chancery; and this was effected, not by the decree of probate, but coercing the party to consent that the probate court should set aside its own decree. In the case of *Gingell v. Horne*, (9 Simon, 539) the vice chancellor says: "The impression which has been fixed in my mind for several years is, that it is settled law that there is no method of escaping from the effect of probate when granted, unless in a case like that of *Barnesly v. Powell*, in which Lord Hardwick set aside the ground on which the probate was obtained." It is said in some cases that a court of chancery in cases of wills of real estate can send out an issue to a court of law, and have the question of the validity of the will tried by a jury. But that occurs only in cases where no objection is taken to the jurisdiction, and does not mean that an action can of right be instituted in a court of chancery for the purpose of having the validity of a will determined by an issue to be sent out of that court. In the case of *Jones v. Jones* (3 Merivale, 171) the Master of the Rolls

says: "It is impossible that at this time of day it can be made a serious question whether it be in this court (of chancery) that the validity of a will, either of real or personal estate, is to be determined. * * * Now, although there may have been instances of issues directed on the bill of an heir at law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction. He may bring his ejectment, and if there be any impediments to the proper trial of the merits, he may come here to have them removed; but he has no right to have an issue substituted in the place of an ejectment."

If there be no statutory method provided for probating or contesting a will of real estate and especially if the title devised be wholly equitable, there seems to be no logical reason why equity should not entertain a bill to declare the alleged will void. In one American case this actually was done.²¹ But the ample jurisdiction of the Ameri-

²¹ Equity has jurisdiction to entertain a bill by an heir at law who seeks to have a will of real estate made prior to the act of Congress, conferring jurisdiction upon the probate courts to admit to probate wills of real estate, declared void as having been procured by fraud and undue influence where the title of the testator which is devised by the will is equitable. In such case the court may either remove the impediment to the right of the heir to maintain ejectment or may frame an issue on the validity of the will to be sent to a jury for trial. If the latter the appellate court will not interfere or review unless there is an abuse of discretion. *Beyer v. Le Fevre*, 17 App. D. C. 238.

A will by a testator domiciled in Louisiana undertook to dispose of an estate consisting of \$3,000 personal property and some real estate in District of Columbia. The will was invalid as to personality by the laws of Louisiana, the testator's domicile. The will contained two general bequests aggregating \$6,000, and a residuary devise. The executrix brought a bill in equity in District of Columbia to

can courts of probate over wills of real estate as well as wills of personalty, and the statutory provisions for contest have removed, almost universally, any pretext for appeal to equity. Equity will not set aside the probate of a will on the ground of fraud, mistake or forgery,²² nor cancel an alleged will on any grounds nor enjoin its probate.²³ The only cases mentioned in which equity will take jurisdiction are those where the fraud was practiced, not upon the testator in procuring the will, but upon the court in procuring the probate.²⁴ But even in this case equity will decline to act if the

establish the will and perpetuate testimony and for directions as to the payment of the legacies. In District of Columbia there is no binding probate as to a will of real property and the probate court had no jurisdiction of a foreign will of personalty. Held that the bill in equity would lie; in effect that there was no other remedy. *Readman v. Ferguson*, 13 App. D. C. 60.

²² *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Langdon v. Blackburn*, 109 Cal. 19, 41 Pac. 814; *Mitchell v. Hughes*, 3 Colo. App. 43, 32 Pac. 185; *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. 130; *Del Campo v. Camarillo*, 154 Cal. 647, 98 Pac. 1049; *Lyne v. Marcus*, 1 Mo. 410, 13 Am. Dec. 509; *Trotters v. Winchester*, 1 Mo. 414; *Swain v. Gilbert*, 3 Mo. 347; *Garland v. Smith*, 127 Mo. 583, 28 S. W. 196, 29 S. W. 836; *Hans v. Holler*, 165 Mo. 47, 65 S. W. 308; *Pitts v. Weakley*, 155 Mo. 109, 55 S. W. 1055; *Loosemore v. Smith*, 12 Neb. 343, 11 N. W. 493 (1882).

²³ *Arnold v. Arnold*, 62 Ga. 629; *Israel v. Wolf*, 100 Ga. 339, 28 S. E. 109; *Adams v. Johnson*, 129 Ga. 611, 59 S. E. 269; *Brown v. Webster*, 87 Neb. 788, 128 N. W. 635.

A will may be revoked even though made in pursuance of contract. The remedy is not by enjoining the probate of a subsequent will, but by enforcing the contract. *Allen v. Bromberg*, 147 Ala. 317, 41 South. 771.

²⁴ *Gray v. Parks*, 94 Ark. 39, 125 S. W. 1023.

aggrieved party might have proceeded to revoke the probate by direct proceedings.²⁵

§ 57. Place of probate

The place in which a will should be offered for probate is, in the first instance, the county of the domicile of the testator.²⁶ This is the usual requirement of the statute.²⁷ A person's domicile is where he resides, intending to remain indefinitely. It embraces the fact of residence and the intention to remain. In the case of a man it may be fixed often by the exercise of political rights: with a woman it may be harder to determine, but depends upon the circumstances of the particular case.²⁸

²⁵ The doctrine that where the probate of a will is obtained by fraud equity may declare the executor or other person deriving title under it a trustee for the party defrauded does not apply where the party might have proceeded to revoke the probate by direct proceedings. *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117; *Miller v. Estate of Miller*, 69 Neb. 441, 95 N. W. 1010; *Locust v. Randle*, 46 Tex. Civ. App. 544, 102 S. W. 946.

²⁶ *McDonnell v. Farrow*, 132 Ala. 227, 31 South. 475; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *McBain v. Wimbish*, 27 Ga. 259; *Godwin v. Godwin*, 129 Ga. 67, 58 S. E. 652.

²⁷ Article 4, § 1, of federal Constitution held not a limitation on the jurisdiction of a state to require the will of a resident to be originally proved in the county of his residence. *Clark's Estate*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

The will of a domiciled resident of this state may be proved by an exemplified copy if the original has been admitted to probate in another state as a basis for the grant of annulling administration. *Hopkin's Appeal*, 77 Conn. 644, 60 Atl. 657.

²⁸ *Merrill v. Morrisett*, 76 Ala. 433.

The domicile of a wife follows that of her husband.²⁹ The domicile of a minor is that of his parents; and even after their death neither he nor his guardian can change it.³⁰ The testator's declarations are evidence of his domicile,³¹ but recitals in the will are not conclusive.³² If the testator had no domicile in the state, but left real estate situated there, then the will may be probated in any county in which any of the real estate lies. If he left no real estate, but only personal estate, within the state, then in any county.³³

§ 58. Preliminary fact of death

The death of the testator is a preliminary fact to be established. Usually this is shown by the affidavit of the person offering the will for probate.³⁴ The fact of death is essential to the juris-

²⁹ *Wickes' Estate*, 128 Cal. 270, 60 Pac. 867, 49 L. R. A. 138.

³⁰ *Daniel v. Hill*, 52 Ala. 430.

³¹ *Ennis v. Smith*, 14 How. 400, 14 L. Ed. 472.

Evidence of domicile. In *re Estate of Ayers*, 84 Neb. 16, 120 N. W. 491.

³² *Merrill v. Morrissett*, 76 Ala. 433; *Daniel v. Hill*, 52 Ala. 430; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913.

³³ *Stewart v. Pettus*, 10 Mo. 755; *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299; *Jaques v. Horton*, 76 Ala. 238.

³⁴ Reputation is sufficient to establish death and heirship. *Secrist v. Green*, 3 Wall. 744, 18 L. Ed. 155.

The probate of a will and the issuing of letters testamentary are prima facie evidence of the death of the testator. *Hendrix v. Boggs*, 15 Neb. 469, 20 N. W. 28.

The common law does not indulge in any presumption of survivorship or death by reason of age or sex when too or more persons are lost in a common disaster. It leaves the ascertainment of the time

diction of probate tribunals, and if this fact does not exist the jurisdiction does not attach.³⁵ The will of a living person is not the subject of probate, and any assumed power to probate the will of a living person or to administer upon his estate is in violation of the fourteenth amendment to the constitution of the United States, as depriving the owner of his property without due process of law.³⁶ And

of death to be gathered like any other fact, from pertinent evidence introduced for this purpose. *Paden v. Briscoe*, 81 Tex. 563, 17 S. W. 42.

³⁵ The fact of death is essential to the jurisdiction of probate tribunals. *Allen v. Dundas*, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9-23, 3 L. Ed. 471; *Mut. Benefit Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. Ed. 314; *McPherson v. Cuniff*, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642; *Peeble's Appeal*, 15 Serg. & R. (Pa.) 39; *Devlin v. Commonwealth*, 101 Pa. 273, 47 Am. Rep. 710; *Jockumsen v. Suffolk Savings Bank*, 3 Allen (Mass.) 87; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122; *Day v. Floyd*, 130 Mass. 488; *Burns v. Van Loan*, 29 La. Ann. 560; *French v. Frazier*, 7 J. J. Marsh. (Ky.) 425; *State v. White*, 30 N. C. 116; *Duncan v. Stewart*, 25 Ala. 408, 60 Am. Dec. 527; *Andrews v. Ivory*, 14 Gratt. (Va.) 229, 73 Am. Dec. 355; *Moore v. Smith*, 11 Rich. (S. C.) 569, 73 Am. Dec. 122; *Morgan v. Dodge*, 44 N. H. 255, 82 Am. Dec. 213; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Melia v. Simmons*, 45 Wis. 334, 30 Am. Rep. 746; *Stevenson v. Superior Ct.*, 62 Cal. 60; *Darusemont v. Jones*, 4 Lea (Tenn.) 251, 40 Am. Rep. 12; *Stevenson v. Superior Ct.*, 62 Cal. 60; *Perry v. St. J. & W. Ry.*, 29 Kan. 420; *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458.

³⁶ A court of probate has no jurisdiction to appoint an administrator of the estate of a living person; and its orders, made after public notice, appointing an administrator of the estate of a person who is, in fact, alive, although he has been absent and not heard from for seven years, and licensing the administrator to sell his land for payment of his debts are void, and the purchaser at the sale takes no title as against him. The judgment of the highest court of the

this, notwithstanding the statutes of the states which raise a presumption of death from seven years' unexplained absence.

§ 59. Manner of probate—Ex parte proceedings

The method of probating a will in the first instance is defined by statutes in the several states, sometimes in general terms, sometimes with particularity. These statutes fall into two general groups: First, those which contemplate an ex parte proceeding;³⁷ second, those which contemplate notice to the heirs or others interested and opportunity to oppose the probate. In the ex parte proceeding the method is very simple. It consists in producing the will itself to the court, or if the statute permits, to the clerk in vacation, accompanied by a formal affidavit of death and heirship made by the person propounding the will.³⁸ The

state confirming the purchaser's title violates the fourteenth amendment to the federal constitution as depriving the owner of his property without due process of law. *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

³⁷ Kansas: Statute now permits examination of witnesses in opposition to will in probate court, but this does not authorize a contest. *Wright v. Young*, 75 Kan. 287, 89 Pac. 694; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

A will may be proved in the court of ordinary in common form ex parte, and on application of the heirs the court will issue a citation to the executor to prove it in solemn form. *Walker v. Perryman*, 23 Ga. 309; *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583. This method is criticized by the court and an appeal made to the legislature to make one contest final.

³⁸ The production of a will for the purpose of probate is not jurisdictional. *Higgins v. Eaton* (C. C.) 188 Fed. 938.

There is no law for probating a copy of a will, except when the

court designated is usually the probate court or the tribunal clothed by statute with that jurisdiction. The court or clerk proceeds to examine the witnesses to the will or such other proof as is offered, and grants a certificate either admitting the will to probate or rejecting it. The law requires that "All the testimony adduced in support of any will shall be reduced to writing, signed by the witnesses, and certified by the clerk."³⁹ When the will is admitted to probate by the clerk, such act must be confirmed by the court at the next ensuing term, or it ceases to be of any validity. It is the judicial act of the court which is essential to a valid probate.⁴⁰ This proceeding is wholly *ex parte*, that is, there is no requirement that the heirs or other persons interested in the estate shall be notified, or shall be heard at this stage of the proceedings. This sort of proceeding is deemed sufficient to justify the establishment of the will as a muniment of title, the appointment of an executor and the ad-

will has been lost or destroyed after the death of the testator or without his consent. *Godwin v. Godwin*, 129 Ga. 67, 58 S. E. 652.

³⁹ *Hospital Co. v. Hale*, 69 Kan. 616, 77 Pac. 537; *Poole v. Jackson*, 66 Tex. 380, 1 S. W. 75.

Statute requiring recording of testimony of witnesses is directory merely. *Reese v. Nolan*, 99 Ala. 203, 13 South. 677.

⁴⁰ *Creasy v. Alverson*, 43 Mo. 19; *Smith v. Estes*, 72 Mo. 310; *Barnard v. Bateman*, 76 Mo. 414; *Snuffer v. Howerton*, 124 Mo. 637, 28 S. W. 166; *Rothwell v. Jamison*, 147 Mo. 601, 49 S. W. 503.

Will may be probated by clerk in vacation under statute. *Fuentes v. McDonald*, 85 Tex. 132, 20 S. W. 43; *Salmon v. Huff*, 9 Tex. Civ. App. 164, 23 S. W. 1044.

ministration of the estate leading to final distribution. If any one wants to contest a will which has been admitted to probate, or to establish a will which has been rejected by the probate court, a method is provided by a separate suit, brought in a court of general jurisdiction. This separate proceeding is usually called a contest and will be treated more at length in the chapter under that head.

§ 60. Manner of probate—On notice and hearing

In the second group of states the statutes contemplate that the probate of the will in the probate court may be opposed.⁴¹ Notice is required to be given to the heirs or next of kin,⁴² provision being

⁴¹ *Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513, affirmed 27 Colo. 97, 59 Pac. 736; *Greathouse v. Jameson*, 3 Colo. 397; *Fortune v. Buck*, 23 Conn. 1; *Safe Deposit Co. v. Sweeney*, 3 App. D. C. 401; *Olmstead v. Webb*, 5 App. D. C. 38; *In re Dahlgren*, 30 App. D. C. 588; *Cummins v. Cummins*, 1 Marv. (Del.) 423; *Hall v. Dougherty*, 5 Houst. (Del.) 435; *Barksdale v. Hopkins*, 23 Ga. 332.

Arkansas Statute of Probate was copied from Kentucky Code. *Mitchell v. Rogers*, 40 Ark. 91; *Newton v. Cocke*, 10 Ark. 169.

Colorado Statute of Probate is taken from Illinois. *Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513.

⁴² *Shields v. Alston*, 4 Ala. 248; *Herring v. Ricketts*, 101 Ala. 342, 13 South. 502; *Gayle v. Johnston*, 80 Ala. 395; *Reese v. Nolan*, 99 Ala. 203, 13 South. 677; *Acklen v. Goodman*, 77 Ala. 521; *Hamilton's Estate*, 120 Cal. 430, 52 Pac. 708; *Cobb's Estate*, 49 Cal. 599; *Bartel's Estate*, Myr. Prob. (Cal.) 130; *Abila v. Padilla*, 14 Cal. 103; *Stewart v. Hall*, 100 Cal. 246, 34 Pac. 706; *Lewis v. Luckett*, 32 App. D. C. 188; *Pettit v. Black*, 13 Neb. 142, 12 N. W. 841; *Rice v. Tilton*, 14 Wyo. 101, 82 Pac. 577; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507 (Cal.).

made for notice by publication.⁴³ The proceeding being in rem, failure to give the statutory notice to widow or next of kin does not defeat jurisdiction; ⁴⁴ the effect of defective notice being that the proceedings may be set aside and the probate begun de novo.⁴⁵

One who has been appointed administrator has a right to be heard on a proceeding to probate a will subsequently produced.⁴⁶ The status of the estate at this stage is that there is no one formally in charge of it. The authority of the executor does not begin until probate and letters issued to him.⁴⁷ The court strictly has no power to appropriate funds of the estate to aid either party until the will

⁴³ *Miller's Estate*, 39 Cal. 550; *Poorman v. Mills*, 39 Cal. 350, 2 Am. Rep. 451; *Curtis v. Underwood*, 101 Cal. 661, 36 Pac. 110; *Davis' Estate*, 136 Cal. 590, 69 Pac. 412; *Melone's Estate*, 141 Cal. 332, 74 Pac. 991; *Warfield's Will*, 22 Cal. 51, 83 Am. Dec. 49; *McCrea v. Haraszthy*, 51 Cal. 146; *Whitney v. Hanington*, 36 Colo. 407, 85 Pac. 84.

Sufficient notice of probate to sustain judgment against collateral attack. *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065; *In re Estate of Sieker*, 89 Neb. 216, 131 N. W. 204, 35 L. R. A. (N. S.) 1058; *Woodruff v. Taylor*, 20 Vt. 65.

⁴⁴ *Dickey v. Vann*, 81 Ala. 425, 8 South. 195; *Ward v. Oates*, 43 Ala. 515; *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101.

⁴⁵ *Cameto's Estate*, Myr. Prob. (Cal.) 75.

⁴⁶ *In re Will of Cornelius*, 14 Ark. 675; *Billings v. Billings*, 4 Ark. 90.

⁴⁷ *Walker v. Perryman*, 23 Ga. 309; *Thomas v. Morrissett*, 76 Ga. 384; *Good Samaritan Hospital v. Trust Co.*, 137 Mo. App. 179, 117 S. W. 637.

has been admitted to or denied probate.⁴⁸ After probate or rejection the court assumes some discretion within narrow limits in awarding costs out of the estate to those who have had a duty to perform and who have pursued the matter in good faith. Thus, as it is made the executor's duty to petition for probate, costs may be allowed him out of the estate.⁴⁹ Appointing an attorney for absent heirs and allowing him a fee to be paid by the estate are matters entirely within the discretion of the probate court.⁵⁰

§ 61. Probate—Procedure

Even when a hearing and opposition is contemplated the procedure is as simple and informal as possible.⁵¹ Any one may petition for probate, whether interested in the estate or not.⁵² The

⁴⁸ *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230.

⁴⁹ *Olmstead's Estate*, 120 Cal. 447, 52 Pac. 804.

Where the probate of a will is contested before the executors have been appointed they have no power to deal with the assets or make any contracts with attorneys as executors; and whether the cost shall be paid by the parties or out of the assets of the estate is discretionary with the court as provided by the statute. *McKinney's Estate*, 112 Cal. 447, 44 Pac. 743.

Attorney's fees are not properly costs. *Olmstead's Estate*, 120 Cal. 447, 52 Pac. 804.

⁵⁰ *Rety's Estate*, 75 Cal. 256, 17 Pac. 65.

⁵¹ *Howard's Estate*, 22 Cal. 395; *Learned's Estate*, 70 Cal. 140, 11 Pac. 587; *Latour's Estate*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *Edelman's Estate*, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231; *In re Doyle*, 73 Cal. 564, 15 Pac. 125; *Estate of Mollenkopf*, 164 Cal. 576, 129 Pac. 997.

⁵² The procedure is of the most informal and perfunctory charac-

production of the will is ordinarily enough to initiate proceedings.⁵³

Written application or petition is not always required, although it may be the better practice.⁵⁴ Provision is made by statute to compel the production of the will if unlawfully withheld.⁵⁵ The statute does not specify precisely what the proof in support of the will shall be, but it must be sufficient to assure the court that all the requirements of law have been observed in the execution of the will; in other words, that the paper produced is the

ter, both in the probate court and in the district court on appeal, and when a prima facie case is made as to testator's testamentary capacity and freedom from illegal restraint the order of admission should be made, leaving for the more formal proceedings provided by statute the contest of the nicer and more difficult questions: a contest in which issues are duly formed, evidence properly introduced and the method provided for obtaining a jury if one be ordered. *Hospital Co. v. Hale*, 69 Kan. 616, 77 Pac. 537; *Wright v. Young*, 75 Kan. 287, 89 Pac. 694; *McConnell v. Keir*, 76 Kan. 527-530, 92 Pac. 540; *Estate of Edwards*, 154 Cal. 91, 97 Pac. 23; *Phelps v. Ashton*, 30 Tex. 344.

⁵³ *Estate of Howard*, 22 Cal. 395.

Parol evidence is admissible to identify the paper propounded as a will. *Burge v. Hamilton*, 72 Ga. 568.

A paper referred to and incorporated in the will need not be presented with the will for probate. *Willey's Estate*, 128 Cal. 1, 60 Pac. 471.

Will and codicil may be probated together. *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481.

⁵⁴ *Boyett v. Kerr*, 7 Ala. 9; *Deslonde v. Darrington*, 29 Ala. 92; *Small v. McCalley*, 51 Ala. 527.

Sufficiency and form of a petition for probate of a will. *Boyett v. Kerr*, 7 Ala. 9; *Small v. McCalley*, 51 Ala. 527.

⁵⁵ *Coulter v. People*, 53 Colo. 40, 123 Pac. 647; *Walch v. Orrell*, 53 Colo. 361, 127 Pac. 141.

lawful will of the testator.⁵⁶ This is called making a *prima facie* case.⁵⁷ If the proponent fails to make a *prima facie* case the court should refuse probate even in the absence of any opposition.⁵⁸ The oral testimony of the attesting witnesses is of course the best testimony. They should be produced if possible.⁵⁹ Whether all the attesting witnesses must be produced if within the reach of process has been differently decided.⁶⁰

Where a will appears upon its face to be properly executed, its due execution for the purpose of probate may be shown even in the absence of at-

⁵⁶ *Cartery's Estate*, 56 Cal. 470; *Janes v. Williams*, 31 Ark. 175; *Tyler's Estate*, 121 Cal. 405, 53 Pac. 928; *Hall v. Hall*, 47 Ala. 290.

Defects in the execution of a will of real property cannot be supplied by parol. In *re McIntire*, 2 Hayw. & H. (D. C.) 339, Fed. Cas. No. 8,823a.

It is the requirement of the law and not the intentions of the testator that govern on question of due execution. *Seaman's Estate*, 146 Cal. 455, 80 Pac. 700, 106 Am. St. Rep. 53, 2 Ann. Cas. 726; *Albright v. North*, 146 Cal. 455, 80 Pac. 700, 2 Ann. Cas. 726.

Finding refusing probate held proper. *Hayden's Estate*, 149 Cal. 680, 87 Pac. 275.

⁵⁷ *Woodroof v. Hundley*, 133 Ala. 395, 32 South. 570; *Wright v. Young*, 75 Kan. 287, 89 Pac. 694; *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

⁵⁸ *Estate of Hayden*, 149 Cal. 680, 87 Pac. 275; *Estate of McDermott*, 148 Cal. 43, 82 Pac. 842; *Renn v. Samos*, 33 Tex. 760; *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650.

⁵⁹ *Berst v. Moxom*, 157 Mo. App. 342, 138 S. W. 74; *Id.*, 163 Mo. App. 123, 145 S. W. 857; *Chase v. Lincoln*, 3 Mass. 236.

⁶⁰ Both attesting witnesses must be examined if they can be had. *Rash v. Purnel*, 2 Har. (Del.) 448.

It is not necessary that all the attesting witnesses, though within the reach of process, be called to prove execution. *Field's Appeal*, 36 Conn. 279.

testing witnesses or in case of their death.⁶¹ Any other persons who were present at the time of the execution are competent witnesses for this purpose; and if no other persons were present but the attesting witnesses, and their attendance cannot be procured by reason of death or other causes, their signatures may be proved by any one familiar with their handwriting as in the case of attesting witnesses to other documents.⁶² Even where the attesting witnesses are available their evidence is not conclusive as to the fact of execution.⁶³

If from forgetfulness, the subscribing witnesses should fail to prove the formal execution of the will, other evidence is admissible to supply the deficiency,⁶⁴ or if the subscribing witnesses all swear

⁶¹ *Hall's Heirs v. Hall's Ex'rs*, 38 Ala. 131.

⁶² *Thompson v. King*, 95 Ark. 549, 129 S. W. 798; *Tevie v. Pitcher*, 10 Cal. 465; *Gharky's Estate*, 57 Cal. 274; *Tyler's Estate*, 121 Cal. 405, 53 Pac. 928; *Mays v. Mays*, 114 Mo. 540, 21 S. W. 921; *Lorts v. Wash*, 175 Mo. 503, 75 S. W. 95; *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1097; *Woodruff v. Hundley*, 127 Ala. 640, 29 South. 98, 85 Am. St. Rep. 145; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Kelly v. Moore*, 22 App. D. C. 9; *Scott v. Herrell*, 31 App. D. C. 45; *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702; *Stephenson v. Stephenson*, 6 Tex. Civ. App. 529, 25 S. W. 649 (*Elwell v. Universalist G. C.*, 76 Tex. 521, 13 S. W. 552 distinguished); *Pettit v. Black*, 13 Neb. 142, 12 N. W. 841.

⁶³ *Estate of McDermott*, 148 Cal. 43, 82 Pac. 842; *D'Avignon's Will*, 12 Colo. App. 489, 55 Pac. 936; *Ashworth v. McNamee*, 18 Colo. App. 85, 70 Pac. 156; *Davis v. Rogers*, 1 Houst. (Del.) 44.

⁶⁴ *Estate of Kent*, 161 Cal. 142, 118 Pac. 523; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Gillis v. Gillis*, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143, 51 Am. St. Rep. 121; *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788.

that the will was not duly executed, they may be contradicted and the will supported by other witnesses or by circumstances.⁶⁵

When a witness who has solemnly subscribed his name to a will as an attesting witness, knowing the nature of his act and that the deceased testator would rely upon his name as a part of the execution of the will, undertakes by his evidence to overthrow or cast suspicion upon it, his evidence should be closely scrutinized.⁶⁶ The testimony of the attesting witnesses, is, however, highly important and desirable; as under the established rule they are permitted and it is their duty to testify not only as to the due execution of the will, but as to the mental capacity of the testator. In doing so they may give their opinion of his mental condition, even though they are not medical experts, but only common illiterate men.⁶⁷

Where the personal attendance of a subscribing witness cannot be procured at the probate of a will, his deposition may be taken and used as evidence, as in other cases under the general statute authorizing the taking of depositions or under the provi-

⁶⁵ *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *In re Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216; *Rash v. Purnel*, 2 Har. (Del.) 448; *Talley v. Moore*, 5 Har. (Del.) 57.

⁶⁶ *Motz's Estate*, 136 Cal. 558, 69 Pac. 294; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129.

⁶⁷ *Crowson v. Crowson*, 172 Mo. 700, 72 S. W. 1065; *Withinton v. Withinton*, 7 Mo. 589; *Duffield v. Morris Ex'r*, 2 Har. (Del.) 375.

sions of the Statute of Wills.⁶⁸ But at the time of giving his deposition such witness should have the will before him for the purpose of identification; and this is a vital point.⁶⁹

After a will has been duly admitted to probate, the law provides that it shall be recorded by the clerk of the probate court in a book kept for that purpose, and the original will filed in his office. The original will or a certified copy of the record of probate then becomes admissible as evidence in all courts.⁷⁰

The law of the forum governs as to the proof of wills⁷¹ and it is the law in force at the death of the testator and not at the time of the execution of the

⁶⁸ *Moore v. Heineke*, 119 Ala. 627, 24 South. 374; *Wisdom v. Reeves*, 110 Ala. 431, 18 South. 13; *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 397; *Kelly v. Moore*, 22 App. D. C. 9.

It is within discretion of court to send will out of state to take depositions as to signature. In *re Estate of Hayes*, 55 Colo. 340, 135 Pac. 449.

⁶⁹ *Cawthorn v. Haynes*, 24 Mo. 236; *Harvy v. Chouteau*, 14 Mo. 587, 55 Am. Dec. 120; *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738.

⁷⁰ *Kolterman v. Chilvers*, 82 Neb. 216, 117 N. W. 405; *F., E. & M. V. Ry. v. Setright*, 34 Neb. 253, 51 N. W. 833; *Rex v. Netherseal*, 4 T. R. 258; *Armstrong v. Lear*, 12 Wheat. 175, 6 L. Ed. 589; *Bent v. Thompson*, 5 N. M. 408-423, 23 Pac. 234; *Hickman v. Gillum*, 66 Tex. 314, 1 S. W. 339; *Pettit v. Black*, 13 Neb. 142, 12 N. W. 841; *Box v. Lawrence*, 14 Tex. 545.

As to what is necessary and proper to appear in this record. *Charlton v. Brown*, 49 Mo. 353; *Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168; *Twombly's Estate*, 120 Cal. 350, 52 Pac. 815; *Kolterman v. Chilvers*, 82 Neb. 216, 117 N. W. 405; *Kirk v. Bowling*, 20 Neb. 260, 29 N. W. 928; *Roberts v. Flanagan*, 21 Neb. 503-509, 32 N. W. 563; *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, 43 S. W. 53; *Russell v. Oliver*, 78 Tex. 11, 14 S. W. 264.

⁷¹ *Tewis v. Pitcher*, 10 Cal. 465.

will.⁷² However, as a will destroyed by accident or public calamity does not pass out of existence, but remains the will of the testator, statutes may be passed even after the death of the testator governing the proof of such wills.⁷³

The proceeding being in rem, an executor offering a will cannot take a non-suit. The statutes require the court to proceed and determine the validity of the instrument.⁷⁴ And, if the issue is submitted to a jury, as it may in some states even in the probate court, the issues should be so framed as to leave the court no option but to admit or reject the will.⁷⁵

In some states the statute prescribes a period within which a will must be offered for probate.⁷⁶ Such statutes are enforced with some strictness against those who have the custody of the will, and whose right and duty it is to present it for probate, but exceptions are made, in the interest of justice, in favor of those who had no such duty or opportunity, as where the will has been in adverse custody.⁷⁷

⁷² *Grimes v. Norris*, 6 Cal. 621, 65 Am. Dec. 545.

⁷³ *Estate of Patterson*, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625.

⁷⁴ *Roberts v. Trawick*, 13 Ala. 68, apparently overruled: *Crow v. Blakey's Ex'r*, 31 Ala. 728.

⁷⁵ *Sanderson's Estate*, 74 Cal. 208, 15 Pac. 753.

⁷⁶ *St. Mary's O. A. v. Masterson*, 57 Tex. Civ. App. 646, 122 S. W. 587; *Stone v. Brown*, 16 Tex. 425.

⁷⁷ *Ochoa v. Miller*, 59 Tex. 460; *Ryan v. T. & P. Ry. Co.*, 64 Tex. 239; *Elwell v. Universalist G. C.*, 76 Tex. 514, 13 S. W. 552; *St. Mary's O. A. v. Masterson*, 57 Tex. Civ. App. 646, 122 S. W. 587.

§ 62. The issue—Devisavit vel non

The only issue that can be tried is *devisavit vel non*.⁷⁸ It is proper for the probate court to go into just as thorough an investigation as it chooses in regard to this one issue—whether the writing produced be the will of the testator. It cannot, however, in such enquiry construe the provisions of the will or pass upon the validity of its terms.⁷⁹ It has been held, sometimes, that the probate court might strike out and refuse to probate a portion of a will on the ground that it was illegal.⁸⁰ But the better rule is that the whole of the will must be probated, leaving the construction or enforcement of its terms to distinct proceedings.⁸¹

⁷⁸ *Vestry v. Bostwick*, 8 App. D. C. 452; *Taylor v. Hilton*, 23 Okl. 354, 100 Pac. 537, 18 Ann. Cas. 385; *Nesbit v. Gragg*, 36 Okl. 703, 129 Pac. 705.

⁷⁹ *Drane v. Beall*, 21 Ga. 21, 45; *Nesbit v. Gragg*, 36 Okl. 703, 129 Pac. 705; *Elwell v. Universalist G. C.*, 76 Tex. 514-520, 13 S. W. 552; *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753; *Higgins v. Vandever*, 85 Neb. 89-95, 122 N. W. 843; *Emmons v. Garnett*, 18 D. C. 52; *Wetter v. Habersham*, 60 Ga. 193; *Estate of Kilborn*, 5 Cal. App. 161, 89 Pac. 985.

⁸⁰ *Kenrick v. Cole*, 61 Mo. 572; *Robinson v. King*, 6 Ga. 539.

Power of court to determine, on probate, that part of will is valid and part invalid. See authorities cited. *Palmer v. Bradley* (C. C.) 142 Fed. 198.

⁸¹ *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055; *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887; *Worrill v. Gill*, 46 Ga. 482; *Garrett v. Wheelless*, 69 Ga. 466; *Thomas v. Morrisett*, 76 Ga. 384; *Taylor v. Hilton*, 23 Okl. 354, 100 Pac. 537, 18 Ann. Cas. 385; *Hargraves v. Lott*, 67 Ga. 133; *Bent's Appeal*, 35 Conn. 524; *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Hopf v. State*, 72 Tex. 281, 10 S. W. 589; *Clements v. Maury*, 50 Tex. Civ. App. 158, 110 S. W. 185; *In re Shillaber*, 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433;

§ 63. Lost or destroyed wills

If the will cannot be produced because it is lost, or has been destroyed by accident, fraud or mistake, this does not destroy the legal effect of the will, or defeat the expectations of the devisees or legatees.

Whether a will is destroyed before or after the death of the testator, if destroyed without his knowledge or consent, it does not cease to be his will, and its contents may be established by competent proof.⁸²

At common law the only way to establish a lost will was to go into equity, as in the case of any other lost instrument, prove the due execution of the will, its loss and its contents, and then proceed to probate it or set it up in a court of law as a muniment of title as in other cases. This must still be done in the absence of statutes conferring jurisdiction on probate courts to establish lost wills.⁸³ Statutes, however, exist in many states giving to the probate court jurisdiction to establish lost wills

Toland v. Toland, 123 Cal. 140, 55 Pac. 681; *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825; *Hall v. Hall*, 38 Ala. 131; *Conoway v. Fulmer*, 172 Ala. 283, 54 South. 624, 34 L. R. A. (N. S.) 963; *C. B. & Q. Ry. v. Wasserman* (C. C.) 22 Fed. 872; *Ware v. Wisner* (C. C.) 50 Fed. 310; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164; *Cobb's Estate*, 49 Cal. 600; *Murphy's Estate*, 104 Cal. 554, 38 Pac. 543.

⁸² *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Schaff v. Peters*, 111 Mo. App. 460, 90 S. W. 1037; *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *McBeth v. McBeth*, 11 Ala. 596; *Gaines v. Hennen*, 24 How. 553, 16 L. Ed. 770.

⁸³ *Waggener v. Lyles*, 29 Ark. 47; *Myars v. Mitchell*, 72 Ark. 381, 80 S. W. 750; *Nunn v. Lynch*, 73 Ark. 20, 83 S. W. 316; *Bryan v. Walton*, 14 Ga. 185; *Ponce v. Underwood*, 55 Ga. 601; *Harris v. Tisereau*, 52 Ga. 153, 21 Am. Rep. 242.

and these statutes have the effect of obviating an appeal to chancery.⁸⁴ The statutes providing for probate of lost wills apply to a mutilated will, part of which is destroyed.⁸⁵

On application to probate an alleged copy of a will it is incumbent upon the proponent to show what became of the original will, in whose custody it was placed, account for its non-production and produce some competent proof of its contents, in order to authorize the court to probate a copy.⁸⁶ One witness is enough to establish the due execution of a lost will if he prove that it was attested by the proper number of witnesses,⁸⁷ unless the statute requires more.⁸⁸ In such cases it is incumbent on the party seeking to establish the will, not only to prove its due execution, but also to rebut the presumption of cancellation which arises from the fact

⁸⁴ Equity has no power to establish a will lost or destroyed by fraud if this is within the jurisdiction of the probate courts. *Jackson v. Jackson*, 4 Mo. 210.

⁸⁵ *Camp's Estate*, 134 Cal. 233, 66 Pac. 227.

⁸⁶ *Caeman v. Van Harke*, 33 Kan. 333, 6 Pac. 620; *In re Estate of Francis*, 94 Neb. 742, 144 N. W. 789.

⁸⁷ *Graham v. O'Fallon*, 3 Mo. 507, Id., 4 Mo. 601; *Varnon v. Varnon*, 67 Mo. App. 534; *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239; *Jaques v. Horton*, 76 Ala. 238; *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110; *In re Johnson's Will*, 40 Conn. 587; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

⁸⁸ *Estate of Kidder*, 57 Cal. 282, Id., 66 Cal. 487, 6 Pac. 326; *Camp's Estate*, 134 Cal. 233, 66 Pac. 227; *Johnson's Estate*, 134 Cal. 662, 66 Pac. 847; *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453; *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500, 84 Am. St. Rep. 263; *Estate of Guinasso*, 13 Cal. App. 518, 110 Pac. 335.

that it cannot be found at the testator's death.⁸⁹ The evidence is similar to that given to establish any other lost instrument; it may be a copy, or if there be no copy, the contents of the will may be proved by the subscribing witnesses or others, who have read it.⁹⁰

That an unrevoked will, which has been lost or destroyed previous to the death of the testator, may be probated and established by parol testimony is beyond dispute, although not in direct terms authorized by the statute. But the contents of a writing cannot be proved by one who simply *heard* the writing read. Proof of the provisions of a destroyed will is quite a different matter from proof of its due execution before two attesting witnesses.⁹¹ It seems that evidence of the declarations of the testator may be given to prove the existence of the lost will, but such declarations alone are not suffi-

⁸⁹ Tynan v. Paschal, 27 Tex. 286, 84 Am. Dec. 619.

⁹⁰ Dawson v. Smith's Will, 3 Houst. (Del.) 335; Fitzgerald v. Wynne, 1 App. D. C. 107; Kearns v. Kearns' Ex'r, 4 Har. (Del.) 83; Mosely v. Carr, 70 Ga. 333; Kitchens v. Kitchens, 39 Ga. 168, 99 Am. Dec. 453.

Evidence insufficient to establish lost will. Moseley v. Evans, 72 Ga. 203; Williams v. Miles, 87 Neb. 455, 127 N. W. 904.

Judgment of court of ordinary admitting lost will may be directly attacked in same court by heir by showing fraudulent misrepresentation of facts on which jurisdiction was based. Davis v. Albritton, 127 Ga. 517, 56 S. E. 514, 8 L. R. A. (N. S.) 820, 119 Am. St. Rep. 352.

⁹¹ Estate of Guinasso, 13 Cal. App. 518, 110 Pac. 335; Propst v. Mathis, 115 N. C. 526, 20 S. E. 710; Nichols v. Kingdom Iron Ore Co., 56 N. Y. 618; Mut. Life Ins. Co. v. Tillman, 84 Tex. 31, 19 S. W. 294.

cient to prove the contents,⁹² although they may be used to corroborate more direct evidence.⁹³

It may happen that the whole of a lost or destroyed will cannot be proved. In some states it is required by statute that the entire will be proved,⁹⁴ in others the courts have decided that the whole will must be before the court for construction.⁹⁵ In general, however, it is not absolutely necessary that the whole will be capable of proof to admit it to probate.⁹⁶ Any substantial provision of a lost will which is complete in itself and independent of the others may, when proved, be admitted to probate, though the other provisions cannot be proved, if the validity and operation of the part which is proved is not affected by those parts which cannot be proved.⁹⁷

⁹² *Williams v. Miles*, 68 Neb. 463, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306.

⁹³ *Clark v. Turner*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433; *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154; *Woodward v. Goulstone*, 11 App. Cas. (Eng.) 469; *In re Page*, 118 Ill. 576, 8 N. E. 852, 59 Am. Rep. 395; *Southworth v. Adams*, 11 Biss. 256, Fed. Cas. No. 13,194; *In re Hope*, 48 Mich. 518, 12 N. W. 682; *In re Lambie*, 97 Mich. 49, 56 N. W. 223; *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667; *Chisholm's Heirs v. Ben*, 7 B. Mon. (Ky.) 408; *Mercer's Adm'r v. Mackin*, 14 Bush (Ky.) 434; *Mann v. Balfour*, 187 Mo. 305, 86 S. W. 103.

Contra: *In re Johnson's Will*, 40 Conn. 587.

⁹⁴ *Todd v. Rennick*, 13 Colo. 546, 22 Pac. 898.

⁹⁵ *Butler v. Butler*, 5 Har. (Del.) 178.

⁹⁶ *Jackson v. Jackson*, 4 Mo. 210; *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110; *Estate of Camp*, 134 Cal. 233, 66 Pac. 227; *Hook v. Pratt*, 8 Hun (N. Y.) 102.

⁹⁷ *Estate of Patterson*, 155 Cal. 626, 102 Pac. 941, 26 L. R. A. (N. C.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625.

§ 64. Foreign wills

A foreign will is the will of one domiciled in another state or country, and is usually executed and first probated in such other state or country. The states of the Union, in this particular, as in many others, are foreign to each other in legal theory. The will of a resident must be proved primarily as a domestic will and not as a foreign will, notwithstanding it was first proved in another state.⁹⁸ The distinction between foreign wills and domestic wills is not especially important in regard to personal property. Wills of such property may be executed and probated, and the property distributed according to the laws of the testator's domicile.⁹⁹ The distinction becomes important in regard to wills of real property. Here two somewhat conflicting principles operate. The first is that, as wills of real property are now required to

⁹⁸ *Estate of Clark*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

Foreign will of personal property admitted to probate in New York notwithstanding it was refused probate in state of domicile for want of testamentary capacity. *Higgins v. Eaton*, 202 Fed. 75, 122 C. C. A. 1 (N. Y.).

⁹⁹ *Patterson v. Dickinson*, 193 Fed. 328, 113 C. C. A. 252; *Willet's Appeal*, 50 Conn. 330.

A will executed and probated in Louisiana, disposing of personal property in Texas is competent evidence in Texas without its probate in Texas. *Hurst v. Mellinger*, 73 Tex. 189, 11 S. W. 184; *Holman v. Hopkins*, 27 Tex. 38.

But a foreign nuncupative will must be probated in the county where the personal property is situated before it can be enforced in this State. Probate has no extraterritorial effect. *St. James' Church v. Walker*, 1 Del. Ch. 284.

be probated the same as wills of personal property, the proper place for this primary probate is in the state or country of the testator's domicile. The second is that the title to land should be regulated exclusively by the laws of the state where the land lies. In harmonizing these two principles the states have sought by statute to give some convenient and proper effect to the primary probate of a foreign will in another state while jealously guarding their right to require the execution and probate of a will to conform to their local law.¹ The probate of a will in one state does not establish its validity as devising real estate in another state, unless the laws of the latter state permit. The validity of the will for that purpose must be determined by the laws of the state in which the land is situated.²

Probate of a will has no extraterritorial force except by statute.³ Where there has been no compliance

¹ Though in matters of probate states by comity permit ancillary jurisdiction of foreign wills, they are jealous of any invasion of, or attempt to invade, their original jurisdiction in such matters. *Estate of Clark*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306; *Readman v. Ferguson*, 13 App. D. C. 60.

² *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. Ed. 300; *Darby v. Mayer*, 10 Wheat. 465, 6 L. Ed. 367; *Davis v. Mason*, 1 Pet. 503, 7 L. Ed. 239; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; *Emmons v. Gordon*, 140 Mo. 490, 41 S. W. 998, 62 Am. St. Rep. 734; *Keith v. Keith*, 97 Mo. 223, 10 S. W. 597; *Turner v. McDonald*, 76 Cal. 181, 18 Pac. 262, 9 Am. St. Rep. 189; *In re Berghin*, 100 Cal. 376, 34 Pac. 867; *Pennel's Lessee v. Weyant*, 2 Har. (Del.) 501; *Pritchard v. Henderson*, 2 Pennewill (Del.) 553, 47 Atl. 376.

³ *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161; *Gemmell v. Wilson*,

with the laws of the state where the land lies, either by probating the will there, or by furnishing the evidence the statute requires as to its foreign probate, the foreign will is not available as a muniment of

40 Kan. 764, 20 Pac. 458; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372; *Markley v. Kramer*, 66 Kan. 664, 72 Pac. 221; *Gaven v. Allen*, 100 Mo. 293, 13 S. W. 501; *Van Syckel v. Beam*, 110 Mo. 589, 19 S. W. 946; *Curtis v. Smith*, 6 Blatchf. 550, Fed. Cas. No. 3,505; *Thrasher v. Ballard*, 33 W. Va. 285, 10 S. E. 411, 25 Am. St. Rep. 894; *Lindley v. O'Reilly*, 50 N. J. Law, 636, 15 Atl. 379, 1 L. R. A. 79, 7 Am. St. Rep. 802; *Sayre v. Sage*, 47 Colo. 559-564, 108 Pac. 160; *Clark v. Huff*, 49 Colo. 197, 202, 112 Pac. 542.

The probate of a will in one state does not establish its validity as devising real estate in another state, unless the laws of the latter state permit it. Records and judicial proceedings of each state affecting property within it have in every other state the force and effect which they possess in the state of their origin, but have no such force as to similar property situated in another state. *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049; *Pritchard v. Henderson*, 2 Pennewill (Del.) 553, 47 Atl. 376; *Hines v. Hines*, 243 Mo. 480, 147 S. W. 774.

A will which has been duly proved and admitted to probate by the court of a sister state having jurisdiction may be probated in this State by the county court of any county in which the testator left property on which such will may operate. In proceeding to probate a foreign will, a copy of the same and the probate thereof, duly authenticated, must be produced to the county court and if allowed in this State, must be filed and recorded in said court. *F. E. & M. V. Ry. v. Setright*, 34 Neb. 253, 51 N. W. 833; *Tillson v. Holloway*, 90 Neb. 481, 134 N. W. 232, Ann. Cas. 1913B, 78; *Martin v. Martin*, 70 Neb. 207, 97 N. W. 289. Statute copied from Michigan. *Wilt v. Cutler*, 38 Mich. 189.

Since act of March 23, 1887 (Acts 20th Leg. c. 56), title to land in Texas under a foreign will passes without probate, when the will with its foreign probate is duly registered in the deed record of the proper county. *De Zbranikov v. Burnett*, 10 Tex. Civ. App. 442, 31 S. W. 71.

The filing and recording in this State of a copy of a foreign will under the statute has no effect except to constitute the will a muni-

title.⁴ The court of the state where the land lies has power to grant original probate of the will of a non-resident, without waiting for any evidence of a foreign probate.⁵ Where a foreign will is first admitted

ment of title for the devisee therein, and does not empower the executor of said will to act as such in this State. In order to acquire such power the will must be probated under the statute which provides for probate of foreign wills. *Mason v. Rodriguez*, 53 Tex. Civ. App. 445, 115 S. W. 868; *Slayton v. Singleton*, 72 Tex. 209-212, 9 S. W. 876; *Brundige v. Rutherford*, 57 Tex. 22.

Sufficient record of foreign probate. *Welder v. McComb*, 10 Tex. Civ. App. 85, 30 S. W. 822. Insufficient. *Green v. Benton*, 3 Tex. Civ. App. 92, 22 S. W. 256.

Prior to the act of 1887 foreign will must be probated in Texas. *Paschal v. Acklin*, 27 Tex. 173; *Houze v. Houze*, 16 Tex. 598.

Foreign will must be probated in Wyoming. Provisions for probate. *Rice v. Tilton*, 13 Wyo. 420, 80 Pac. 828, Id., 14 Wyo. 101, 82 Pac. 577.

Under present statute of Georgia the title to lands in Georgia can only pass by devise where the will has been probated in this State. Provision is made for the probate of foreign wills. An exemplified copy of a foreign probate is no longer sufficient. *Doe v. Roe*, 31 Ga. 593, is expressly overruled. *Chidsey v. Brookes*, 130 Ga. 218, 60 S. E. 529, 14 Ann. Cas. 975; *Youmans v. Ferguson*, 122 Ga. 331, 50 S. E. 141; *Conrad v. Kennedy*, 123 Ga. 242, 51 S. E. 299; *Thomas v. Morrisett*, 76 Ga. 384.

⁴ *Henderson v. Belden*, 78 Kan. 121, 95 Pac. 1055.

The recording of a foreign will without proper proof of its probate is not constructive notice. *Lewis v. Barnhart*, 145 U. S. 56, 12 Sup. Ct. 772, 36 L. Ed. 621.

No title is acquired under a quitclaim deed from the devisee in a foreign will which has never been probated in California. *Turner v. McDonald*, 76 Cal. 177, 18 Pac. 262, 9 Am. St. Rep. 189.

An action cannot be maintained by a devisee to recover lands in Pennsylvania under a foreign will, which was not proved as required by the laws of the state. *De Roux v. Girard's Ex'r*, 112 Fed. 89, 50 C. C. A. 136.

⁵ *Estate of Edelman*, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep.

to probate in the state of the testator's residence, it may afterward be admitted to probate in the state where the land lies.⁶ If the foreign probate is not in such manner as to make it effectual to pass real estate in the state where the land lies it may be reprobated there, or the deficiencies supplied by proof.⁷ If the foreign probate is to be accorded any effect the proof of such foreign probate and the proceedings as shown by the record thereof must conform in all respects to the statutes of the state where the land lies.⁸ Whether a will probated in a foreign state has been properly

231; *Parnell v. Thompson*, 81 Kan. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658.

⁶ *Sullivan v. Rabb*, 86 Ala. 437, 5 South. 746.

⁷ *Doe v. Pickett*, 51 Ala. 584; *Culbertson v. Witbeck*, 127 U. S. 326, 8 Sup. Ct. 1136, 32 L. Ed. 134; *James v. Cherokee Lodge*, 110 Ga. 627, 36 S. E. 69.

⁸ *Wickersham v. Johnston*, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *Apperson v. Bolton*, 29 Ark. 418; *Janes v. Williams*, 31 Ark. 175; *Leatherwood v. Sullivan*, 81 Ala. 458, 1 South. 718; *Currell v. Villars* (C. C.) 72 Fed. 330; *Secrist v. Green*, 3 Wall. 744, 18 L. Ed. 153; *Long v. Patton*, 154 U. S. 573, append., 14 Sup. Ct. 1167, 19 L. Ed. 881.

In all cases where it is proper to introduce in evidence the foreign probate of a will a certified copy of the record of probate is sufficient. The probate of a will in another State is a judicial proceeding to the record of which full faith and credit is to be given when certified according to the act of congress. *Bright v. White*, 8 Mo. 421; *Haile v. Hill*, 13 Mo. 618; *Applegate v. Smith*, 31 Mo. 166; *Lewis v. St. Louis*, 69 Mo. 595; *Bradstreet v. Kinsella*, 76 Mo. 66; *Keith v. Keith*, 80 Mo. 125; *Gaines v. Fender*, 82 Mo. 497; *Drake v. Curtis*, 88 Mo. 646; *Fenderson v. Mo. T. & T. Co.*, 104 Mo. App. 290, 78 S. W. 819; *Stevens v. Oliver*, 200 Mo. 512, 98 S. W. 492; *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772; *Scott v. Herrell*, 27 App. D. C. 395; *Dusenberry v. Abbott*, 1 Neb. (Unof.) 101, 95 N. W. 466.

probated so as to entitle it to probate or record in some other state is a question of fact and the finding of the probate court of the state where the land lies is conclusive against collateral attack.⁹ Therefore in such court the sufficiency of the proof of foreign probate and the question of the residence of the testator are usually open to contest.¹⁰ The requirements of notice to heirs, etc., which are made in regard to domestic wills do not extend, usually, to foreign wills.¹¹ The property within the state is the *res* conferring jurisdiction, and only that property is affected.¹²

§ 65. Recording will as a conveyance

If the will affects the title to real property, a copy of the will showing its due probate must be recorded in the office provided for the record of land titles in each county in which any of the land lies.¹³ This recording is not necessary to the validity of the will, nor

⁹ *Goldtree v. McAlister*, 86 Cal. 93, 23 Pac. 207, 24 Pac. 801.

¹⁰ *Estate of Clark*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

¹¹ *Brock v. Frank*, 51 Ala. 85; *Ward v. Oates*, 43 Ala. 515; *Dickey v. Vann*, 81 Ala. 425, 8 South. 195.

¹² *Estate of Clark*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

A tax deed holder is not within protection of statute that title of purchaser in good faith without knowledge of will derived from heirs of any person who is not a resident shall not be defeated by production of will unless same shall be offered for record within two years of final probate. *Harris v. Defenbaugh*, 82 Kan. 765, 109 Pac. 681.

¹³ *Wolf v. Brown*, 142 Mo. 612, 44 S. W. 733.

In Kansas, in the probate court of each county in which any of the land lies. Section 8687, Gen. St. Kan. 1905.

to pass the title to the property to the devisees, but is simply for the purpose of charging purchasers and others with constructive notice of the conveyance as in the case of other conveyances.¹⁴ The same reason also compels the recording of foreign wills, for it is held:

One dealing with land situated in this state is not charged with constructive notice of a will probated in another state. The will must be recorded in this state, before the purchaser is charged with constructive notice of it.¹⁵

It is held in Kansas that knowledge of a foreign will sufficient to charge a party with notice may be acquired by other means than a proper record.¹⁶

EFFECT OF PROBATE

§ 66. Under American statutes

At common law the ecclesiastical courts had jurisdiction to probate testaments of personalty only, the proceeding was in rem, and the decree could not be collaterally assailed. In other countries it operated merely as evidence. Devises of real estate did not need a formal probate to entitle them to be received as evidence. The ecclesiastical courts had no jurisdiction of them, and their existence and validity could be

¹⁴ *Rodney v. Landan*, 104 Mo. 260, 15 S. W. 962; *Wolf v. Brown*, 142 Mo. 612, 44 S. W. 733; *McLavy v. Jones*, 31 Tex. Civ. App. 354, 72 S. W. 407.

¹⁵ *Keith v. Keith*, 97 Mo. 223, 10 S. W. 597; *Van Syckel v. Beam*, 110 Mo. 589, 19 S. W. 946; *Meyers v. Smith*, 50 Kan. 1, 31 Pac. 670.

¹⁶ *Markley v. Kramer*, 66 Kan. 664, 72 Pac. 221.

contested only by ordinary actions, wherein the judgment was binding only on parties and privies.¹⁷ As the American statutes have extended the requirement of probate to wills of real estate and placed them on the same footing in this respect as wills of personalty it is held by many courts that the probate proceedings are in rem,¹⁸ and equally binding in the case of wills

¹⁷ *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Janes v. Williams*, 31 Ark. 175-187.

¹⁸ In the case of *Tompkins v. Tompkins*, 1 Story, 547, Fed. Cas. No. 14,091, Judge Story, in speaking of the law of England, says: "The validity of wills of real estate is solely cognizable by courts of common law in the ordinary forms of suits, and the verdict of the jury in such suits, and the judgment thereon, are, by the very theory of the law, conclusive only as between the parties to the suit and their privies. But it is far otherwise in cases of personal estate. The sentence and decree of the proper ecclesiastical court, as to the personal estate, is not only evidence, but is conclusive as to the validity or invalidity of the will; so that the same cannot be re-examined or litigated in any other tribunal. The reason is that, it being the sentence or decree of a court of competent jurisdiction directly upon the very subject matter in controversy, to which all persons who have any interest are or may make themselves parties, for the purpose of contesting the validity of the will, it necessarily follows that it is conclusive between those parties. For otherwise, there might be conflicting sentences or adjudications upon the same subject matter between the same parties; and thus the subject matter be delivered over to interminable doubts, and the general laws as to the effect of *res judicata* be completely overthrown. In short, such sentences are treated as of the like nature as sentences or proceedings in rem, necessarily conclusive upon the matter in controversy for the common safety and repose of mankind." Then, after stating that by the laws of Rhode Island the probate courts have complete jurisdiction as to the probate of wills, whether the wills respect real estate or personal estate, or both, and making some remarks upon the effect of these local laws, he says: "In short, there can be no difference in point of principle, where the court of probate has an

of real property as in case of wills of personal property. One of the best statements of the law on that

absolute and positive jurisdiction, whether the will respects real estate or personal estate. In such case, the will must be equally open to controversy in all other courts and suits, or it is closed in all. Yet no one pretends that the probate is not conclusive as to the personal estate of the testator, and the title of the executor thereto. * * * Upon the whole in the absence of all controlling authorities under the local law, looking at the matter upon principle, I am of opinion that the probate of the present will by the Supreme Court of the state, being a court of competent jurisdiction, is final and conclusive upon the question of the validity of the will to pass the real estate in controversy."

In the case of *Adams v. De Cook*, 1 McAll, 253, Fed. Cas. No. 51, the court say: "In this State [California], where the general power of proving all wills is vested in a special jurisdiction known as the probate court, the jurisdiction of the tribunal is as conclusive in regard to the probate of wills of real and personal estate as is that of the ecclesiastical courts in England in relation to wills of personalty. If, therefore, there had been a probate of this document as a will by the appropriate tribunal in this State, such action, if final, would have been conclusive." In the case of *Deslonde and James v. Darrington's Heirs*, 29 Ala. 95, the court say: "The probate of a will, under any circumstances, is a proceeding in rem. It operates upon the thing itself. It defines, and in a great degree, creates its status. The status thus defined adheres to it as a fixture; and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world." In the case of *Bogardus v. Clark*, 4 Paige (N. Y.) 625, the court say: "It [a probate of a will of personalty] is in the nature of a proceeding in rem, to which any person having an interest may make himself a party, by applying to the proper tribunal before which such proceeding is had, and who will therefore be bound by the sentence or decree of such tribunal, although he is not in fact a party." In *Woodruff v. Taylor*, 20 Vt. 65, the court say: "The probate of a will I conceive to be a familiar instance of a proceeding in rem in this state. The proceeding is in form and substance upon the will itself. No process is issued against any one, but all persons interested in determining the state or condition of

subject is the following quotation from a California case:¹⁹

In the United States, the probating of wills is regulated in most states, and probably in all, by statutes in which the pow-

the instrument are constructively notified by a newspaper publication to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is or is not the will of the testator. It determines the status of the subject matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this State is concerned) just what the judgment declares it to be." In the case of *Ballow v. Hudson*, 13 Grat. (Va.) 682, the court say: "Considerations of public policy require that all questions of succession to property should be authoritatively settled. Courts of probate are therefore organized to pass on such questions, when arising under wills; and a judgment by such court is conclusive whilst it remains in force, and the succession is governed accordingly. A judgment of this nature is classed amongst those which in legal nomenclature are called judgments in rem. Until reversed, it binds not only the immediate parties to the proceeding in which it is had, but all other persons and all courts."

The cases above cited have been selected from a great body of cases of like import, because, while showing the conformity of our laws with those of England, as to the conclusiveness of probate decrees, they also show the reason why they are conclusive, not only upon the parties who may be before the court, but upon all other persons and upon all courts; and that is, that it is not a proceeding to decide a contest between parties, but a proceeding in rem, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment, and not left to be buffeted about by different, and possibly conflicting, judgments of various courts.

A judgment admitting a paper to probate in solemn form as a will is not binding upon heirs at law who had no notice of the ap-

¹⁹ *State v. McGlynn*, 20 Cal. 233-265, 81 Am. Dec. 118.

er to probate wills is conferred upon a special court, a probate or surrogate court, corresponding in this respect to the ecclesiastical courts of England. In some of the states, following the English system, the power to probate is only given in cases of wills of personal estate, leaving wills of real estate to be proved on the trial of any particular action depending upon it. In others, the power to probate is extended to both kinds of wills, but making it conclusive only in cases of wills of personal property, and only prima facie evidence, and liable to be disproved on trials of cases depending upon wills of real estate. In others, the power to probate applies to wills of both kinds, and the same conclusive effect is given to the probate in both cases.

Upon examining the decisions of the supreme court of the United States, and the courts of the several states, it will be found that they have uniformly held that the principles established in England apply and govern the cases arising under

plication for such probate, and may attack the will when set up as a source of title without having previously set aside the judgment of probate. *Medlock v. Merritt*, 102 Ga. 212, 29 S. E. 185; *Hightower v. Williams*, 104 Ga. 608, 30 S. E. 862. This was decided under the Georgia code, making judgment in common form conclusive after seven years, on all except minor heirs, but probate in solemn form conclusive only upon heirs notified and legatees represented by the executor. See, also, *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504.

By the act of Congress probate of a will of real estate is prima facie evidence only of the validity of the will; therefore it may be contested in an action of ejectment. *Barbour v. Moore*, 4 App. D. C. 535-545; *Perry v. Sweeny*, 11 App. D. C. 404.

See *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Kumpe v. Coons*, 63 Ala. 448; *Nelson v. Boynton*, 54 Ala. 368; *Martin v. King*, 72 Ala. 354; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *McCann v. Ellis*, 172 Ala. 60, 55 South. 303; *Allen v. Prater*, 35 Ala. 169; *Deslonde v. Darrington's Heirs*, 29 Ala. 92; *Reese v. Nolan*, 99 Ala. 203, 13 South. 677; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117; *Dilworth v. Rice*, 48 Mo. 124; *Stowe v. Stowe*, 140 Mo. 594, 41 S. W. 951; *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447.

the probate laws of this country, and that in the United States, wherever the power to probate a will is given to a probate or surrogate's court, the decree of such court is final and conclusive, and not subject, except on an appeal to a higher court, to be questioned in any other court, or be set aside or vacated by the court of chancery on any ground.

§ 67. Difference between proceeding in rem and in personam

The difference in legal effect between a proceeding in rem and one in personam or inter partes may be thus stated:

In a proceeding in rem the jurisdiction of the court is founded upon its possession or control of the res, or thing which is the subject of the litigation. The action is to determine the legal status of that res. The court having control thereof can determine that status, and its judgment is binding upon the res and all parties interested therein. It is binding upon the world and conclusive upon all tribunals except those having an appellate jurisdiction or power of review over that particular proceeding.²⁰ A suit in personam or inter partes, on the other hand, is founded upon jurisdiction acquired over the parties. The judgment therein is binding only upon the parties and those in privity with them.²¹

²⁰ Jourden v. Meier, 31 Mo. 40; Torrey v. Bruner, 60 Fla. 365, 53 South. 337; Steele v. Renn, 50 Tex. 467-481, 32 Am. Rep. 605; Scott v. Caloit, 3 How. (Miss.) 158.

²¹ Proceedings to probate or to set aside the probate of wills are proceedings in rem and not in personam. Such proceedings are exclusively to determine the status of the res and not the rights of the

§ 68. Decree of probate not subject to collateral attack

For the protection of those whose rights may have been adversely affected by the summary process of probate, an ample power of review usually is provided, either by appeal from the judgment of probate or some other form of direct proceeding. This provision for review is called a "contest" and will be the subject of the next chapter. Except by this direct proceeding the judgment of probate is unassailable. It is not subject in any other court or in any other proceeding in the same court to collateral attack.²² The converse

parties. Judgments in proceedings in rem are conclusive as to the whole world which in personam are conclusive only as to parties and privies to the suit. Hence the probate of a will cannot be set aside as to some heirs and not as to others. *McCann v. Ellis*, 172 Ala. 60, 55 South. 303.

Making judgment of probate conclusive does not violate fourteenth amendment of United States Constitution. *Sutton v. Hancock*, 118 Ga. 436-442, 45 S. E. 504.

²² *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Bothwell v. Hamilton*, 8 Ala. 461; *James v. Williams*, 31 Ark. 175; *Ludlow v. Flournoy*, 34 Ark. 451; *Petty v. Ducker*, 51 Ark. 281, 11 S. W. 2; *Carraway v. Moore*, 75 Ark. 146, 86 S. W. 993; *St. Joseph's Convent v. Garner*, 66 Ark. 623, 53 S. W. 298; *Copley v. Ball*, 176 Fed. 682, 100 C. C. A. 234; *Selden v. Ill. Trust & Sav. Bank*, 184 Fed. 872, 107 C. C. A. 196; *Warfield's Will*, 22 Cal. 51, 83 Am. Dec. 49; *Ward v. Co. Com'rs*, 12 Okl. 267, 70 Pac. 378; *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772; *Langston v. Marks*, 68 Ga. 435; *Venable v. Veal*, 112 Ga. 677, 37 S. E. 887; *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583; *Smith v. Stone*, 127 Ga. 483, 56 S. E. 640; *Churchill v. Jackson*, 132 Ga. 666, 64 S. E. 691, 49 L. R. A. (N. S.) 875, Ann. Cas. 1913E, 1203; *Maund v. Maund*, 94 Ga. 479, 20 S. E. 360; *Weathers v. McFarland*, 97 Ga. 266, 22 S. E. 988; *Peters v. West*, 70 Ga. 343; *Rash v. Purnel*, 2 Har. (Del.) 448-451; *Pennel's Lessee v. Weyant*, 2 Har. (Del.) 501; *Loosemore v. Smith*, 12 Neb. 343, 11 N. W. 493;

of this proposition is equally true, that a judgment refusing probate, which is a finding that the deceased died intestate, is equally binding until set aside in proper manner.²³ The probate court is the judge of the weight and credibility of the testimony in support of the will.²⁴ Neither the insufficiency of the proof upon which probate was granted²⁵ nor any irregularities of procedure after jurisdiction has attached are available in a collateral proceeding.²⁶ Even facts showing

Andersen v. Andersen, 69 Neb. 565, 96 N. W. 276; Byron Reed Co. v. Klabunde, 76 Neb. 801, 108 N. W. 133; Roberts v. Flanagan, 21 Neb. 503, 32 N. W. 563; Jackson v. Phillips, 57 Neb. 189, 77 N. W. 683; Paschal v. Acklin, 27 Tex. 173; Lewis v. Ames, 44 Tex. 319; March v. Huyter, 50 Tex. 243; Patten v. Herring, 9 Tex. Civ. App. 640, 29 S. W. 388; Locust v. Randle, 46 Tex. Civ. App. 544, 102 S. W. 946; Deutsch v. Rohlfing, 22 Colo. App. 543-556, 126 Pac. 1123; Bent v. Thompson, 5 N. M. 408-423, 23 Pac. 234; In re Estate of Hayes, 55 Colo. 340, 135 Pac. 449.

What is collateral attack. Davis' Estate, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; Stead v. Curtis, 205 Fed. 439, 123 C. C. A. 507 (Cal.).

Suit to enforce specific performance of oral contract to devise is not a collateral attack on will. Best v. Gralapp, 69 Neb. 815, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491.

²³ Castro v. Richardson, 18 Cal. 478.

No reprobate after a final decree against the validity of the will. Bradley v. Andress, 27 Ala. 596.

²⁴ Wickes' Estate, 139 Cal. 195, 72 Pac. 902; Kirbell v. Pitkin, 75 Conn. 301, 53 Atl. 587; Kolterman v. Chilvers, 82 Neb. 216, 117 Pac. 405; Fischer v. Giddings, 43 Tex. Civ. App. 393, 95 S. W. 33.

²⁵ Jourden v. Meier, 31 Mo. 40; Fortune v. Buck, 23 Conn. 1; Whitman v. Haywood, 77 Tex. 557, 14 S. W. 166.

²⁶ Knox v. Paull, 95 Ala. 505, 11 South. 156; In re Collins, 151 Cal. 340, 90 Pac. 827, 91 Pac. 397, 129 Am. St. Rep. 122; Dunsmuir v. Coffey, 148 Cal. 137, 82 Pac. 682; Dunsmuir v. Hopper, 149 Cal. 67, 84 Pac. 657; Acklen v. Goodman, 77 Ala. 521; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Warfield's Will, 22

revocation of the will cannot be thus pleaded.²⁷ Such defects may be remedied by direct proceedings.²⁸ Every intendment is made in favor of the regularity of the action of the probate court.²⁹ The will duly admitted to probate, by a court having jurisdiction, becomes a conveyance and is evidence in all courts of the title of those who claim under it.³⁰ The court

Cal. 51, 83 Am. Dec. 49; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Kumpe v. Coons*, 63 Ala. 448; *Wood v. Matthews*, 53 Ala. 1; *Brock v. Frank*, 51 Ala. 85; *Hall v. Hall*, 47 Ala. 290; *Mathews v. McDade*, 72 Ala. 377; *Glover v. Coit*, 36 Tex. Civ. App. 104, 81 S. W. 136.

²⁷ *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504; *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772.

²⁸ *Hilliard v. Binford*, 10 Ala. 977; *Lees v. Brownings*, 15 Ala. 495; *Roy v. Segrist*, 19 Ala. 810; *Stapleton v. Stapleton*, 21 Ala. 587; *Lovett v. Chisolm*, 30 Ala. 88; *Satcher v. Satcher*, 41 Ala. 26, 91 Am. Dec. 498; *Hall v. Hall*, 47 Ala. 290; *Brock v. Frank*, 51 Ala. 85; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

But where will of feme covert before the enabling statute was admitted to probate the only remedy of the heirs was by appeal. *Judson v. Lake*, 3 Day (Conn.) 326.

Conviction of perjury in securing probate of a fictitious will. *People v. Rodley*, 131 Cal. 240, 63 Pac. 351.

²⁹ *McCrea v. Haraszthy*, 51 Cal. 146; *Davis' Estate*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; *Moore v. Earl*, 91 Cal. 632, 27 Pac. 1087; *Rice's Estate*, Myr. Prob. (Cal.) 183; *Martin v. Smith*, 23 Tex. Civ. App. 665, 57 S. W. 299; *Yarbrough v. De Martin*, 28 Tex. Civ. App. 276, 67 S. W. 177; *Stead v. Curtis*, 205 Fed. 439, 123 C. C. A. 507 (Cal.).

A will more than fifty years old, proved and recorded in the proper office, is admissible as an ancient paper or document, notwithstanding the probate is defective; provided possession has been held of the property under and by virtue of the will. *Jordan v. Cameron*, 12 Ga. 267.

Insufficient record of probate under South Carolina statute. *Pine-land Club v. Robert*, 171 Fed. 341, 96 C. C. A. 233.

³⁰ *Newman v. Virginia T. & C. Co.*, 80 Fed. 228, 25 C. C. A. 382:

of testator's domicile having complete jurisdiction of all questions relating to the capacity of the testator, the execution and validity of the will and the distribution of the personal estate, the decision of that court is binding in other states, *even on the question of domicile*.³¹ The conclusiveness of the probate decree is confined, however, to the issues presented. Thus a will disposing of both real and personal property is properly presented for probate, but it may be entitled to probate as a will of personal property only and not as to the realty.³² So, it has been held by some

Chilcott v. Hart, 23 Colo. 40-45, 45 Pac. 391, 35 L. R. A. 41; *Thursby v. Myers*, 57 Ga. 155; *Churchill v. Corker*, 25 Ga. 479.

A probate in Louisiana of a will of a person who died domiciled in New York is valid until set aside in the Louisiana court, though the order of the surrogate in New York has been reversed in the Supreme Court of that state, on which the Louisiana probate was founded. A purchaser from the devisee of such will of real estate in Louisiana, while the order of the Louisiana court establishing the will remains in force, is an innocent purchaser, and is not affected by a subsequent order setting aside the will to which he is not a party. *Foulke v. Zimmerman*, 14 Wall. 113, 20 L. Ed. 785.

³¹ *Higgins v. Eaton*, 183 Fed. 388, 105 C. C. A. 608, Id., (C. C.) 188 Fed. 938; *Palmer v. Bradley* (C. C.) 142 Fed. 193; *Dunsmuir v. Coffey*, 148 Cal. 137, 82 Pac. 682; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Brock v. Frank*, 51 Ala. 85; *Estate of Dole*, 147 Cal. 188-194, 81 Pac. 534; *Irwin v. Scriber*, 18 Cal. 499; *In re Griffith*, 84 Cal. 107, 23 Pac. 528, 24 Pac. 381; *In re Eichhoff*, 101 Cal. 605, 36 Pac. 11; *Estate of Latour*, 140 Cal. 421, 73 Pac. 1070, 74 Pac. 441; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *Torrey v. Bruner*, 60 Fla. 365, 53 South. 337.

A decree granting ancillary probate of will held conclusive only as to property in the ancillary jurisdiction. *Clark's Estate*, 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

³² Courts of probate stand in the same ground with common law

courts that if the record of probate shows on its face that the will was not properly executed the probate is not binding, but may be collaterally assailed.³³

courts as to the conclusiveness of their judgments in matters within their jurisdiction, but all judgments are coextensive only with the issue and conclude nothing not necessarily involved in the issue. Where a court of probate admitted generally the will of a minor which was good as to personalty but void as to realty, this does not preclude the heirs from an action of ejectment as to the realty even though the probate court has attempted to make an order of distribution as to the realty, and the heirs are not precluded from showing the minority of the testatrix. *Dickinson v. Hayes*, 31 Conn. 417; *Starr v. Starr*, 2 Root (Conn.) 303-314.

³³ *Carlton v. Taylor*, 89 Ga. 490, 15 S. E. 643; *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019; *Fortner v. Wiggins*, 121 Ga. 26, 48 S. E. 694; *Janes v. Dougherty*, 123 Ga. 43, 50 S. E. 954; *Bullard v. Wynn*, 134 Ga. 636, 68 S. E. 439.

CHAPTER VI

CONTEST OF WILLS

- § 69. Distinction between common and solemn form of probate.
- 70. Nature of contest proceeding.
- 71. Jurisdiction of federal courts in will contests.
- 72. Contest—Time for bringing.
- 73. Contest—Form of action.
- 74. Contest—Parties.
- 75. Contest—Estoppel—Agreements and settlements between heirs and legatees.
- 76. Contest—Procedure.
- 77. Contest is statutory and therefore an action at law.
- 78. Contest—Burden of proof.
- 79. Contest—The issue.
- 80. Contest—Trial by jury.
- 81. Evidence—Attesting witnesses.
- 82. Evidence of sanity—Opinion evidence of lay witnesses.
- 83. Evidence of sanity—Medical witnesses.
- 84. Evidence of sanity—Declarations of testator.
- 85. Evidence of sanity—Range of testimony.
- 86. Privilege of physicians and attorneys.
- 87. Admissibility of various matters.
- 88. Contest—Directing a verdict.
- 89. Contest—Judgment—Costs.
- 90. Contest—Appellate courts.
- 91. Contest—Administrator pendente lite.

§ 69. Distinction between common and solemn form of probate

Under the English practice there were two modes of proving a will of personal property—the common form in which the will was propounded by the execu-

tor, and proved *ex parte*; and the solemn form in which the next of kin of the testator were cited to witness the proceedings and in which the proof was taken *per testes*, or in form of law as it was called.¹ It has been said that the statutory provisions for contesting a will stand in the place of, and are the substitutes for, the proof in solemn form as practiced in the ecclesiastical courts when the will was of personal property, and of the action of ejectment at common law when the will was of real property.²

¹ *Hubbard v. Hubbard*, 7 Or. 42; *Luper v. Werts*, 19 Or. 122-126, 23 Pac. 850; *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Benoist v. Murrin*, 48 Mo. 48; *Watson v. Alderson*, 146 Mo. 344, 48 S. W. 478, 69 Am. St. Rep. 615; *Brown v. Anderson*, 13 Ga. 171; *Sutton v. Hancock*, 118 Ga. 436-439, 45 S. E. 504.

"Under the English common law two forms of probating a will were recognized, namely, the common and solemn forms. The common form required no notice to the heirs or interested parties, while the solemn form required such parties to be cited to appear; and, where a will had been probated in common form, any interested party could appear, and have the will re-probated in solemn form at any time within thirty years." *Bent v. Thompson*, 5 N. M. 408-417, 23 Pac. 234.

"In this state probate in common form is the only one which appears to have been adopted by any positive enactment of the legislature." *Hubbard v. Hubbard*, 7 Or. 42; *Luper v. Werts*, 19 Or. 122-126, 23 Pac. 850.

Only solemn form of probate is permitted of a nuncupative will. *Kirby v. Kirby's Adm'r*, 40 Ala. 492.

² *Lyons v. Campbell*, 88 Ala. 462, 7 South. 250; *Kumpe v. Coons*, 63 Ala. 448; *Johnson v. Glasscock*, 2 Ala. 218; *Knox v. Paull*, 95 Ala. 505, 11 South. 156.

§ 70. Nature of contest proceeding

Much confusion has occurred in the decisions as to whether the character of a proceeding in rem, which attaches to the probate of a will in the informal, summary, and sometimes ex parte proceedings in the probate court, follows it into the contest, or whether the latter becomes a suit inter partes.³ The effect of treating the proceeding as one in rem is to vest the court with jurisdiction on constructive notice,⁴ and make its judgment binding on all the world.⁵ It would not serve any useful purpose to detail the statutory provisions of the several states giving this right of contest or review of probate. The general purpose of the statutes is the same: to provide a review of the summary action of the probate court, when demanded; to give all parties in interest their day in court; and to fix a short and convenient limit of time within which the direct proceeding for review must be brought or the judgment of probate become final.

³ Contest is a proceeding in rem. *Kumpe v. Coons*, 63 Ala. 448; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117; *Martin v. King*, 72 Ala. 354; *Maurer v. Miller*, 77 Kan. 92-95, 93 Pac. 596, 127 Am. St. Rep. 408, 15 Ann. Cas. 663; *Coleman v. Martin*, 6 Blatchf. 119, Fed. Cas. No. 2,985; *Bradford v. Blossom*, 207 Mo. 177-228, 105 S. W. 289; *Cruit v. Owen*, 21 App. D. C. 378; *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902.

⁴ *Martin v. King*, 72 Ala. 354; *Estate of Davis*, 151 Cal. 318, 86 Pac. 183, 90 Pac. 711, 121 Am. St. Rep. 105; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117.

⁵ The probate of a will is a proceeding in rem, and binding on all the world, and hence the parties claiming to be heirs cannot submit a contest of the will to arbitration. *Carpenter v. Bailey*, 127 Cal. 582, 60 Pac. 162.

§ 71. Jurisdiction of federal courts in will contests

The question of the jurisdiction of the federal courts in the various branches of probate procedure is a matter of some difficulty. The exercise of such jurisdiction may be sought:

First: In cases of probate or contest.

Second: In cases of construction.

Third: In cases of debts and the protection of creditors.

Fourth: In cases of accounting and distribution.

It will aid greatly in understanding the subject to keep these branches separate, and therefore each will be treated under its appropriate head. We are concerned here only with the jurisdiction relating to probate and contest. It is but natural that loose expressions should occur in the opinions which will tend to confuse the subject, unless care is used in examining the cases to find what the exact issue in each case was.⁶ The jurisdiction of the federal courts is a limited jurisdiction depending either upon the existence of a federal question or upon the diverse citizenship of the parties; and where these elements are wanting, it cannot proceed even with the consent of the parties.⁷

⁶ "The legal custody of an estate by a probate or county court or by its officer, is no obstacle to the exercise by a federal court of this jurisdiction, because the law imposes upon the state court the duty to give full faith, credit and effect to the adjudications of the federal court when certified to it." *McClellan v. Carland*, 187 Fed. 915, 110 C. C. A. 49. This was really a suit for distribution, and not for administration.

Will contest and suit for construction confused. *Palmer v. Bradley* (Ill.) 154 Fed. 311, 83 C. C. A. 231.

⁷ *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

Such courts, therefore, have no power over the probate of wills in either common form or solemn form or as a proceeding in rem,⁸ unless the case comes up in some form from the District of Columbia or the territories.⁹ Such jurisdiction is not derived from the constitution, nor conferred by acts of congress, nor was it inherent in the high court of chancery. The courts of the United States are possessed of all the inherent powers exercised by the high court of chancery, but this did not embrace the probate of wills which was exclusively in the jurisdiction of the ecclesiastical courts. Equity claimed no authority either to establish or disestablish a will, or to review the action of the ecclesiastical court,¹⁰ except where the probate itself was obtained by fraud.¹¹

⁸ *Ball v. Tompkins* (C. C. Mich.) 41 Fed. 486; *Toms v. Owen* (C. C. Mich.) 52 Fed. 417; *McDonnell v. Jordan*, 178 U. S. 229-236, 20 Sup. Ct. 886, 44 L. Ed. 1048; *Farrell v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101; *Higgins v. Eaton* (C. C. N. Y.) 178 Fed. 153; *Underground Electric Ry. v. Owsley* (C. C. N. Y.) 169 Fed. 671; *Id.*, 176 Fed. 26, 99 C. C. A. 500; *Higgins v. Eaton* (C. C. N. Y.) 188 Fed. 938; *Hargroves v. Redd*, 43 Ga. 142.

Probate jurisdiction of federal courts—authorities collected. *Bedford Quarries Co. v. Thomlinson*, 95 Fed. 208, 36 C. C. A. 276, note.

⁹ *Campbell v. Porter*, 162 U. S. 478, 16 Sup. Ct. 871, 40 L. Ed. 1044; *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049.

¹⁰ *Tarver v. Tarver*, 9 Pet. 174, 9 L. Ed. 91; *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Gains v. Chew*, 2 How. 619, 11 L. Ed. 402; *Fouvergne v. New Orleans*, 18 How. 470, 15 L. Ed. 399; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006; *Cilley v. Patten* (C. C.) 62 Fed. 498; *Oakley v. Taylor* (C. C. Mo.) 64 Fed. 245; *Goodrich v. Ferris* (C. C.) 145 Fed. 844; *Underground Electric Ry. Co. v. Owsley* (C. C. N. Y.) 169 Fed. 671; *Id.*, 176 Fed. 26, 99 C. C. A. 500.

¹¹ *Patterson v. Dickinson* (Cal.) 193 Fed. 328-334, 113 C. C. A. 252.

The federal courts, however, possess a twofold jurisdiction—one dependent upon a federal question arising under the constitution, laws and treaties of the United States; the other dependent upon the diverse citizenship of the parties. Under the former it seems clear that they have no probate jurisdiction. Under the latter their jurisdiction is, in a sense, derivative. It is exercised in substitution for the jurisdiction which would be exercised by the state court if the diverse citizenship did not exist. Therefore the state law determines the form and character of the action. Where the jurisdiction of the federal court is appealed to on the ground of the diverse citizenship of the parties in a will contest, the question whether such jurisdiction can be invoked either in an original suit or on removal from the state court depends upon whether there be a controversy between opposing parties. If a judicial controversy exists between real opposing parties there is no reason why it may not be brought in, or removed to the federal court.

In the leading federal case on this subject the law is thus stated:

There are, it is true, in several decisions of this court expressions of opinion that the federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties; indeed in the majority of instances no such controversy exists. In its initiation all persons are cited to appear whether of the state where the will is offered or of other states. From its nature

and from the want of parties or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity between parties of different states of which the federal courts have concurrent jurisdiction with the state courts under the Judiciary Act; but whenever a controversy, in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the federal courts should not take jurisdiction of the case, than there is that they should not take jurisdiction of any other controversy between the parties.¹²

It is by no means certain that the courts have adhered strictly to this simple rule. There seems to be much conflict of opinion between the different circuits. But generally speaking, the rule may be stated thus: The federal courts have no jurisdiction either by original action or removal over a purely probate proceeding which might have been conducted in the ecclesiastical courts of England and which has been transplanted from thence to the probate tribunals of the states; but where the state statutes provide for a contest or other form of proceeding for testing the validity of a will in a court of general jurisdiction, this controversy may, in case the requisite amount and citizenship exists, be taken to the federal court.¹³

¹² *Gaines v. Fuentes*, 92 U. S. 22, 23 L. Ed. 524.

¹³ Federal court will take jurisdiction. *Richardson v. Green* (Or.) 9 C. C. A. 565, 61 Fed. 423; *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. 327, 27 L. Ed. 1006; *Sawyer v. White*, (Mo.) 122 Fed. 223, 58 C. C. A. 587; *Everhart v. Everhart* (C. C. Miss.) 34 Fed. 82; *Brodhead v. Shoemaker* (C. C. Ga.) 44 Fed. 518, 11 L. R. A. 567; *Id.*, 85 Ga. 728, 11 S. E. 845; *McDermott v. Hannon* (D. C. N. Y.) 203 Fed. 1015.

Federal court will not take jurisdiction. *In re Cilley* (C. C. N. H.)

§ 72. Contest—Time for bringing

At common law probate in solemn form was conclusive from its date but probate in common form was not. Probate in common form could be contested, but the right to call for proof in solemn form did not exist forever. After the lapse of time under the English law probate in common form became conclusive. This time seems not to have been definitely fixed. In Swinburne's Testaments 816, it is stated that after a lapse of ten years "necessary solemnities are presumed to have been observed." American statutes fix a time, usually short, within which a direct proceeding to attack the probate of a will must be brought.¹⁴ If the proceeding is not begun within the

58 Fed. 977; *Ball v. Tompkins* (C. C. Mich.) 41 Fed. 486; *McArthur v. Allen* (C. C. Ohio) 3 Fed. 313; *Grignon v. Astor*, 2 How. 319, 11 L. Ed. 283; *O'Callaghan v. O'Brien*, 199 U. S. 89, 25 Sup. Ct. 727, 50 L. Ed. 101; *Carrau v. O'Callaghan*, 125 Fed. 657, 60 C. C. A. 347; reversing *O'Callaghan v. O'Brien* (C. C.) 116 Fed. 934; *Miller v. Weston* (Colo.) 199 Fed. 104, 119 C. C. A. 358; *Stead v. Curtis* (Cal.) 191 Fed. 529, 112 C. C. A. 463; *Higgins v. Eaton* (N. Y.) 188 Fed. 938-955; *Copeland v. Bruning* (C. C. Ind.) 72 Fed. 5.

¹⁴ *Lyons v. Berlau*, 67 Kan. 426, 73 Pac. 52; *Brinkley v. Sanford*, 99 Ga. 130, 25 S. E. 32; *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583; *Vance v. Crawford*, 4 Ga. 445; *Speer v. Speer*, 74 Ga. 179; *Miller v. Livingstone*, 31 Utah, 415, 88 Pac. 338; *Ransome v. Bearden*, 50 Tex. 119; *Stead v. Curtis* (Cal.) 205 Fed. 439, 123 C. C. A. 507; *McDermott v. Hannon* (D. C. N. Y.) 203 Fed. 1015; *Chapple v. Gidney*, 38 Okl. 596, 134 Pac. 859.

While the statutes regulating the probate of wills provide no time within which probate shall be applied for, yet they contemplate that this shall be speedily done. *McGowan v. Elroy*, 28 App. D. C. 188.

If a contest is begun within two years after probate, others may intervene after the two-year period. *Maurer v. Miller*, 77 Kan. 92, 93 Pac. 596, 127 Am. St. Rep. 408, 15 Ann. Cas. 663; *Bradford v. Andrews*, 20 Ohio St. 208, 5 Am. Rep. 645.

time set by the statute the probate becomes absolute and not open to further attack, direct or collateral.¹⁵ Even the attempt to probate another will or codicil of later date than the probated will is regarded as a contest and is barred by the statute.¹⁶ It is assumed, in this statement, that proper jurisdiction existed in the tribunal admitting the will to probate.¹⁷ These limitations do not bar persons who have been under legal disabilities, such as infants, insane persons, convicts and, formerly married women. These are allowed the statutory period after they have attained legal capacity to sue for their rights, a very inconvenient and sometimes dangerous matter where the title to land is derived from a will, but one which cannot be avoided with justice to these innocent claimants. It

¹⁵ *Bent v. Thompson*, 138 U. S. 114, 11 Sup. Ct. 238, 34 L. Ed. 902; *Cunningham's Estate*, Myr. Prob. (Cal.) 214; *Dunsmuir's Estate*, 149 Cal. 67, 84 Pac. 657; *Focha v. Estate of Focha*, 8 Cal. App. 576, 97 Pac. 321; *Estate of Ricks*, 160 Cal. 467, 117 Pac. 539; *Sbarboro's Estate*, 63 Cal. 5; *San Francisco P. O. Asylum v. Superior Court*, 116 Cal. 448, 48 Pac. 379.

Contest in probate court of probated will; appeal to district court from order annulling probate; will probated in 1867; petition for reprobate or review filed 1887; action dismissed as not warranted by statute and not governed by common law. *Bent v. Thompson*, 5 N. M. 408, 23 Pac. 234; 138 U. S. 114, 11 Sup. Ct. 238, 34 L. Ed. 902.

The limitation of one year for the contest of a will limits the right to attack a particular devise for fraud. *Maxwell's Estate*, 74 Cal. 384, 16 Pac. 206.

¹⁶ *Hardy v. Hardy's Heirs*, 26 Ala. 524; *Watson v. Turner*, 89 Ala. 220, 8 South. 20; *Adsit's Estate*, Myr. Prob. (Cal.) 266.

¹⁷ But application to set aside probate for want of notice may be barred by laches. *Whitaker v. McKinney*, 134 Ala. 326, 32 South. 695, 92 Am. St. Rep. 37.

results from this that the formal probate of a will in the probate court is not final and conclusive until the statutory period has run. It is liable to be attacked successfully within that time, and any dealing with the property, such as a sale by the devisee under the will, does not pass title if the will is set aside.¹⁸

The other aspect of this matter is also productive of great inconvenience. A person is supposed to have died intestate and administration has been granted upon his estate, and the title to his real estate has descended to his heirs; in this case, if a will be afterwards found, the administrator must be discharged and the will admitted to probate. If the heirs have sold and conveyed the land and the will which is discovered makes a different disposition of it the title of the purchasers fails and they cannot hold the property against the devisees and those claiming under them. At common law, no lapse of time was sufficient to destroy the validity of a will. It might be probated at any length of time after the testator's death. In a case in Massachusetts a will was admitted to probate sixty-three years after the testator's death, and the court held that in the absence of a statute of limita-

¹⁸ *Hughes v. Burriss*, 85 Mo. 660; *Tapley v. McPike*, 50 Mo. 589; *Robertson v. Brown*, 187 Mo. 457, 86 S. W. 187, 106 Am. St. Rep. 485.

Contest of a will may be brought before the probate court in term time has confirmed the probate of the will. *Sunderland v. Hood*, 13 Mo. App. 240; *Potter v. Adams*, 24 Mo. 159. The time limited for bringing contest is not extended by the civil code giving one year after suit is dismissed to begin new action. *Medill v. Snyder*, 71 Kan. 590, 81 Pac. 216.

tion the will might be probated at any length of time.¹⁹ With the exceptions above noted we seem to have in these states no statutes of limitation which apply directly to probate of wills. The will must be probated at any time it is offered; but if the property disposed of by the will is in the adverse possession of another, which would almost certainly be the case, the devisees or legatees might not be able to bring any action to recover it if our ordinary statutes of limitation had run against them.

§ 73. Contest—Form of action

The form of action varies greatly in the several states. In some there is an appeal from the action of the probate court in admitting or rejecting the will.²⁰ This is especially true in those states that pro-

¹⁹ *Haddock v. B. & M. Ry.*, 146 Mass. 155, 15 N. E. 495, 4 Am. St. Rep. 295.

Evidence sufficient to require probate of a will, although offered for probate twenty-one years after death of the testator. *St. Mary's O. A. v. Masterson*, 57 Tex. Civ. App. 646, 122 S. W. 587.

²⁰ *Eastis v. Montgomery*, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227; *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *Greathouse v. Jameson*, 3 Colo. 397; *Clough v. Clough*, 10 Colo. App. 433, 51 Pac. 513, affirmed 27 Colo. 97, 59 Pac. 736; *Lawrie v. Lawrie*, 39 Kan. 480, 18 Pac. 499; *Gallon v. Haas*, 67 Kan. 225, 72 Pac. 770; *Bethany Hospital v. Hale*, 69 Kan. 618, 77 Pac. 537; *Hogane v. Hogane*, 57 Ark. 508, 22 S. W. 167; *In re Calkins*, 112 Cal. 296, 44 Pac. 577; *Leavenworth v. Marshall*, 19 Conn. 408; *Ouachita Baptist College v. Scott*, 64 Ark. 349, 350, 42 S. W. 536; *Parker v. Parker*, 10 Tex. 83; *Mackey v. Atoka*, 34 Okl. 572, 126 Pac. 767; *Davis v. Rogers*, 1 Houst. (Del.) 183; *Harrell v. Hamilton*, 6 Ga. 37; *Evans v. Arnold*, 52 Ga. 169; *Hooks v. Brown*, 125 Ga. 122-132, 53 S. E. 583; *Barksdale v. Hopkins*, 23 Ga. 332; *Coleman v. Floyd*, 105 Ark.

vide for notice and hearing in the probate court. Sometimes when a will is admitted to probate without notice to those entitled to it the probate will be set aside on their application.²¹ The right of appeal is necessarily limited to those who appeared in the probate court,²² and sometimes parties who had such right are precluded from any other form of contest.²³ Usually there is another form of action provided by statute for contesting or revoking the probate of a will, or for establishing a will that has been rejected. This is by a separate action begun, either in the probate court,²⁴ or in a court of general jurisdiction.²⁵ Sometimes this is the exclusive remedy—there being no appeal from probate;²⁶ but usually it is a concur-

301, 150 S. W. 703; *Phelps v. Ashton*, 30 Tex. 344; *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902; *Anderson v. Anderson*, 69 Neb. 565, 96 N. W. 276.

²¹ *Herring v. Ricketts*, 101 Ala. 340, 13 South. 502; *Roy v. Segrist*, 19 Ala. 810; *Dickey v. Vann*, 81 Ala. 425, 8 South. 195; *Stapleton v. Stapleton*, 21 Ala. 587; *Walker v. Jones*, 23 Ala. 448; *Lees v. Browning*, 15 Ala. 495; *Lovett v. Chisolm*, 30 Ala. 88; *Kirby v. Kirby*, 40 Ala. 495.

Power of court of probate to set aside probate of will asserted and doubted. *Hill v. Hill*, 6 Ala. 166; *Kirby v. Kirby*, 40 Ala. 492; *Roy v. Segrist*, 19 Ala. 810; *Sowell v. Sowell's Adm'r*, 40 Ala. 243; *Lovett v. Chisolm*, 30 Ala. 88.

²² *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Clemens v. Patterson*, 38 Ala. 721; *Swift v. Thomas*, 101 Ga. 89, 28 S. E. 618.

²³ *Estate of Cunningham*, 54 Cal. 556; *Breeding v. Grantland*, 135 Ala. 497, 33 South. 544.

²⁴ *Franks v. Chapman*, 61 Tex. 576; *Willms v. Plambeck*, 76 Neb. 195, 107 N. W. 248; *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543; *In re Dye v. Meece*, 16 N. M. 297, 120 Pac. 306.

²⁵ *Dean v. Swayne*, 67 Kan. 241, 72 Pac. 780; *Chapple v. Gidney*, 38 Okl. 596, 134 Pac. 859.

²⁶ *In re Duty*, 27 Mo. 43.

rent remedy, or designed for those who were not heard on probate.²⁷ In some states the jurisdiction is conferred upon courts of chancery, but it is purely statutory, as chancery claims no independent jurisdiction of will contests.²⁸ When once probated a will can only be contested as provided by statute.²⁹ In some states a foreign will may be contested in the same manner as a domestic one, in other states a foreign will cannot be contested at all.³⁰

§ 74. Contest—Parties

As a general rule the statutes and principles governing contest of wills require that there be a full hearing, and that all persons interested in the will or who would be interested in the estate in the absence of a will, be made parties to the proceeding.³¹

²⁷ *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832, 121 Am. St. Rep. 117; *Bacigalupo v. Superior Court*, 108 Cal. 92, 40 Pac. 1055; *Selden v. Ill. Trust & Svc. Bank*, 184 Fed. 872, 107 C. C. A. 196; *Estate of Roarke*, 8 Ariz. 16, 68 Pac. 527; *Mitchell v. Rogers*, 40 Ark. 91; *Dowell v. Tucker*, 46 Ark. 438; *Sbarboro's Estate*, 63 Cal. 5; *San Francisco P. O. Asylum v. Superior Court*, 116 Cal. 448, 48 Pac. 379; *Durant v. Durant*, 89 Kan. 347, 131 Pac. 613.

²⁸ *Hunt v. Acre*, 28 Ala. 580; *Janes v. Williams*, 31 Ark. 175-186; *Knox v. Paull*, 95 Ala. 505, 11 South. 156.

Action to contest a will erroneously called an equitable one. *Williams v. Miles*, 63 Neb. 859, 89 N. W. 451.

²⁹ *Knox v. Paull*, 95 Ala. 505, 11 South. 156.

³⁰ *Acklin v. Paschal*, 48 Tex. 147; *Mason v. Rodriguez*, 53 Tex. Civ. App. 445, 115 S. W. 868; *Poole v. Jackson*, 66 Tex. 380, 1 S. W. 75.

³¹ *Eddie v. Parke*, 31 Mo. 513; *Watson v. Alderson*, 146 Mo. 349, 48 S. W. 478, 69 Am. St. Rep. 615; *Wells v. Wells*, 144 Mo. 198, 45

The executor is a necessary party and in the case of a probated will has a right to support and defend the will.³²

In most jurisdictions a person who undertakes to contest a will, either by appeal from probate or by separate action, must show some interest. The interest of contestant must be plead and proved or the contest will be dismissed,³³ but objection to parties must be made before judgment.³⁴ An heir at law may contest without any other showing of interest than heirship,³⁵ so

S. W. 1095; *Layton v. Jacobs*, 5 Pennewill (Del.) 71, 62 Atl. 691; *Coleman v. Floyd*, 105 Ark. 301, 150 S. W. 703.

Contingent remaindermen are not necessary parties to a will contest. *Naylor v. McRuer*, 248 Mo. 423, 154 S. W. 772; *Miller v. Foster*, 76 Tex. 479, 13 S. W. 529.

³² *Whetton's Estate*, 98 Cal. 203, 32 Pac. 970; *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Miller v. Texas & Pac. Ry.*, 132 U. S. 662, 10 Sup. Ct. 206, 33 L. Ed. 487; *Evans v. Arnold*, 52 Ga. 169; *Finch v. Finch*, 14 Ga. 362.

³³ *Estate of Edelman*, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231; *Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242; *Lockard v. Stephenson*, 120 Ala. 641, 24 South. 996, 74 Am. St. Rep. 63; *Foster's Case*, 91 Ala. 613, 8 South. 349; *State ex rel. v. McQuillin*, 246 Mo. 674, 152 S. W. 341, Ann. Cas. 1914B, 526; *Teckenbrook v. McLaughlin*, 246 Mo. 711-719, 152 S. W. 38; *Vestry v. Bostwick*, 8 App. D. C. 452; *Murry v. Heunessey*, 48 Neb. 608, 67 N. W. 470.

Under the decisions of the Supreme Court of Oregon, after a will has been probated, then any one interested in the estate can attack the will in what is called "a direct proceeding." *Jones v. Dove*, 6 Or. 188; *Hubbard v. Hubbard*, 7 Or. 42; *Brown v. Brown*, 7 Or. 299; *Clark's Heirs v. Ellis*, 9 Or. 133; *Chrisman v. Chrisman*, 16 Or. 128, 18 Pac. 6; *Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *Potter v. Jones*, 20 Or. 240, 25 Pac. 769, 12 L. R. A. 161; *Rothrock v. Rothrock*, 22 Or. 551, 30 Pac. 453.

³⁴ *Blake v. Harlan*, 80 Ala. 37.

³⁵ *Estate of Benton*, 131 Cal. 472, 63 Pac. 775; *Hays v. Bowdoin*, 159 Ala. 600, 49 South. 122; *Tracy v. Muir*, 151 Cal. 363, 90 Pac. 832,

may the widow,³⁶ legatees, devisees,³⁷ beneficiaries under a trust,³⁸ assignees of legatees,³⁹ claimants under prior⁴⁰ or subsequent wills.⁴¹

Persons having no interest cannot contest.⁴² Creditors of the testator have no such interest as will authorize them to contest,⁴³ nor has the public admin-

121 Am. St. Rep. 117; *Wetter v. Habersham*, 60 Ga. 193; *Meyer v. Fogg*, 7 Fla. 292, 68 Am. Dec. 441.

³⁶ *Rainey v. Ridgway*, 148 Ala. 524, 41 South. 632; *Benton's Estate*, 131 Cal. 472, 63 Pac. 775.

³⁷ *Estate of Wickes*, 139 Cal. 195, 72 Pac. 902; *Finch v. Finch*, 14 Ga. 362; *State v. McQuillin*, 246 Mo. 674, 152 S. W. 341, Ann. Cas. 1914B, 526.

³⁸ *Estate of Fay*, 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17.

³⁹ *Engle's Estate*, 124 Cal. 292, 56 Pac. 1022.

⁴⁰ *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960; *Langley's Estate*, 140 Cal. 130, 73 Pac. 824; *Buckingham's Appeal*, 57 Conn. 545, 18 Atl. 256.

⁴¹ *McCutchen v. Loggins*, 109 Ala. 457, 19 South. 810; *Roulett v. Mulherin*, 100 Ga. 591, 28 S. E. 291; *Armstrong v. Johnson*, 2 H. & H. (D. C.) 13, Fed. Cas. No. 18,226.

Contest between claimants under different wills. That a former will has been admitted to probate is no bar to the probate of a subsequent one, and an incident of the latter will be the setting aside of the probate of the former. *Vance v. Upson*, 64 Tex. 266; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122; *Gaines v. Hennen*, 24 How. 567, 16 L. Ed. 770; *Bowen v. Johnson*, 5 R. I. 112, 73 Am. Dec. 49; *Schultz v. Schultz*, 10 Grat. (Va.) 358, 60 Am. Dec. 335; *Clark v. Wright*, 3 Pick. (Mass.) 68; *Ainsworth v. Briggs*, 49 Tex. Civ. App. 344, 108 S. W. 753; *Green v. Hewett*, 54 Tex. Civ. App. 534, 118 S. W. 170.

⁴² *McCutchen v. Loggins*, 109 Ala. 457, 19 South. 810.

Donee of an heir is not a "person interested in the estate" under the statute entitled to bring suit to set aside will. *Ransome v. Bear-den*, 50 Tex. 119.

⁴³ *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349; *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583.

istrator,⁴⁴ nor does the possibility of escheat give the state such right.⁴⁵

Proceedings may be brought by an infant, or person of unsound mind, through next friend or guardian ad litem.⁴⁶

§ 75. Contest—Estoppel—Agreements and settlements between heirs and legatees

Equitable defenses by way of estoppel are available in the probate court,⁴⁷ and the court may take cognizance of transfers, releases, agreements or extinguishment of heirship relied on as a defense by way of estoppel to a contest of a will.

It is a general rule that when one has accepted benefits under an instrument with full knowledge of the facts on which his right is based he is thereby estopped from asserting the invalidity of the instrument. The rule of law is that a party taking the benefit of a provision in his favor under a will is estopped from attacking the validity of the instrument especially if there has been a lapse of time, witnesses have died and he and other parties interested have so changed their positions that they cannot be restored to statu quo:

⁴⁴ Hickman's Estate, 101 Cal. 609, 36 Pac. 118.

⁴⁵ State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; State v. Superior Court, 148 Cal. 55, 82 Pac. 672, 2 L. R. A. (N. S.) 643.

⁴⁶ In re Dye v. Meece, 16 N. M. 297, 120 Pac. 306; In re Estate of Van Alstine, 26 Utah, 193, 72 Pac. 942; Holland v. Courts, 42 Tex. Civ. App. 515, 98 S. W. 233.

⁴⁷ Estate of Edelman, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231; Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623.

and this is so even though the complaining party be the heir at law and the attack is made on the ground of fraud, undue influence and want of testamentary capacity of the testator.⁴⁸ But estoppel does not apply unless other parties are misled to their detriment.⁴⁹

When a legatee has received a legacy under the will he should either restore or offer to restore it before instituting proceedings to set aside the probate.⁵⁰ A settlement or agreement between heirs or legatees is always possible.⁵¹ An agreement by a legatee under

⁴⁸ *Utermehle v. Norment*, 197 U. S. 40, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520; s. c. Id., 22 App. D. C. 31; *Stone v. Cook*, 179 Mo. 534, 78 S. W. 801, 64 L. R. A. 287; *Lanning v. Gay*, 70 Kan. 358, 78 Pac. 810, 85 Pac. 407; *Medlock v. Merritt*, 102 Ga. 212, 29 S. E. 185; *Branson v. Watkins*, 96 Ga. 54, 23 S. E. 204; *Deveney v. Burton*, 110 Ga. 56-59, 35 S. E. 268; *Thompson v. Chapeau*, 132 Ga. 847, 65 S. E. 127; *Holland v. Coutts*, 42 Tex. Civ. App. 515, 98 S. W. 233.

⁴⁹ *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814; *Weatherhead v. Baskerville*, 11 How. 329, 13 L. Ed. 717; *Scoby v. Sweatt*, 28 Tex. 713.

Widow's election to take under will, if procured by fraud, will not estop her heirs from contesting will. *Wickersham's Estate*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437.

No estoppel by deed. *Johnson v. Porter*, 115 Ga. 401, 41 S. E. 644.

No estoppel by election against contesting will. *Holland v. Coutts*, 100 Tex. 232, 98 S. W. 236.

⁵⁰ *Woodcock v. McDonald*, 30 Ala. 411; *Vance v. Crawford*, 4 Ga. 445; *Bowen v. Howenstein*, 39 App. D. C. 585, Ann. Cas. 1913E, 1179.

⁵¹ *McDonnell v. Jordan*, 142 Ala. 279, 38 South. 122; *Carroll v. Kelly*, 111 Ala. 661, 20 South. 456; *Fortner v. Wiggins*, 121 Ga. 26, 48 S. E. 694; *Chisolm v. Spullock*, 87 Ga. 665, 13 S. E. 571; *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960.

A contract by the legatee, not to offer the will for probate, but to divide the estate of the deceased ancestor according to the Statute of Distributions, is not a bar in the court of ordinary to the pro-

a will to pay money to an heir at law of the testator for forbearance of his right to contest the will rests upon a valuable consideration and is valid and it is immaterial whether or not there were valid grounds for the contest.⁵² Such an agreement binds no one but the parties to it,⁵³ and it seems that a collusive agreement between the executors and certain heirs, or between heirs, to have a will set aside in fraud of other legatees under it is opposed to public policy and void.⁵⁴

An agreement made in the lifetime of the testator with the expectant heir to compound or relinquish all interest in the estate that might in the future vest in him will operate as an estoppel to a contest of a will.⁵⁵

pounding of the will. The court of ordinary will not decide upon the validity of any contract which the parties may have entered into but upon the factum of the will only, leaving the rights of the parties to be determined by the appropriate tribunals thereafter. *Finch v. Finch*, 14 Ga. 362.

Contra: An agreement not to probate will be enforced as estoppel in probate proceedings. *Stringfellow v. Early*, 15 Tex. Civ. App. 597, 40 S. W. 871.

⁵² *Sheppey v. Stevens* (C. C.) 185 Fed. 147; *Prater v. Miller*, 25 Ala. 320, 60 Am. Dec. 521; *Seaman v. Seaman*, 12 Wend. (N. Y.) 382; *Palmer v. North*, 35 Barb. (N. Y.) 282; *Clark v. Lyons*, 38 Misc. Rep. 516, 77 N. Y. Supp. 967; *Rector v. Teed*, 120 N. Y. 583, 24 N. E. 1014.

Notes given in settlement of a threatened contest are valid. *Snowball v. Snowball*, 164 Cal. 476, 129 Pac. 784; *Parriss v. Jewell*, 57 Tex. Civ. App. 199, 122 S. W. 399; *Ruth v. Krone*, 10 Cal. App. 770, 103 Pac. 960; *Lipps v. Panko*, 93 Neb. 469, 140 N. W. 761.

⁵³ *Gay v. Sanders*, 101 Ga. 601, 28 S. E. 1019; *Dominici's Estate*, 7 Cal. Unrep. 289, 87 Pac. 389.

⁵⁴ *Gugolz v. Gehrkins*, 164 Cal. 596, 130 Pac. 8, 43 L. R. A. (N. S.) 575; *Ridenbaugh v. Young*, 145 Mo. 274, 46 S. W. 959.

⁵⁵ *Garcelon's Estate*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43

Such agreements may be made with the ancestor or with co-heirs.⁵⁶

§ 76. Contest—Procedure

When the contest takes the form of a separate action in a court of general jurisdiction it is usually provided that the trial be *de novo*.⁵⁷ This may be the case also on appeal from probate.⁵⁸ This is for the purpose of allowing those parties who were not represented in the probate court to have an equal opportunity with those who were, which would not be the case if any binding force was attached to the action of the probate court. In some jurisdictions, however, a *prima facie* validity attaches to a probated will, which must be overcome by the contestants.⁵⁹ This occasions much variation in the

Am. St. Rep. 134; *Estate of Edelman*, 148 Cal. 233, 82 Pac. 962, 113 Am. St. Rep. 231.

⁵⁶ *Field v. Camp* (C. C.) 193 Fed. 160; *Estate of Wickersham*, 153 Cal. 603, 96 Pac. 311.

⁵⁷ *Lamb v. Helm*, 56 Mo. 420; *Elliott v. Welby*, 13 Mo. App. 19; *Bridwell v. Swank*, 84 Mo. 471; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Moore v. McNulty*, 164 Mo. 111, 64 S. W. 159; *Herring v. Ricketts*, 101 Ala. 340, 13 South. 502.

⁵⁸ *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870; *Heist v. Universalist G. C.*, 76 Tex. 514, 13 S. W. 552; *In re Estate of Normand*, 88 Neb. 767, 130 N. W. 571; *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902.

⁵⁹ *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461; *Renn v. Samos*, 33 Tex. 760; *Franklin v. Boone*, 39 Tex. Civ. App. 597, 88 S. W. 262; *Scott v. Thrall*, 77 Kan. 688, 95 Pac. 563, 17 L. R. A. (N. S.) 184, 127 Am. St. Rep. 449; *Rich v. Bowker*, 25 Kan. 7; *Willms v. Plambeck*, 76 Neb. 195, 107 N. W. 248; *In re Estate of Hayes*, 55 Colo. 340, 135 Pac. 449.

procedure of different states in these contest cases. In fact it will not be possible in a general work of this character to do more than point out the main features of procedure. The petition must allege sufficient grounds of contest.⁶⁰ The allegations should be of fact and not conclusions of law.⁶¹ Any number of objections may be alleged, and proof of one is sufficient.⁶² A codicil may be contested as a will,⁶³ or a will and codicil in the same action.⁶⁴ In some jurisdictions it is held that the contest may be as to part only of the will.⁶⁵

⁶⁰ Sheppard's Estate, 149 Cal. 219, 85 Pac. 312; Clarke's Estate, Myr. Prob. (Cal.) 259; State v. Superior Court, 148 Cal. 55, 82 Pac. 172, 2 L. R. A. (N. S.) 643; Gharky's Estate, 57 Cal. 274; Burrell's Estate, 77 Cal. 481, 19 Pac. 880; Crozier's Estate, 65 Cal. 332, 4 Pac. 412; Myer's Estate, Myr. Prob. (Cal.) 205; Wilson's Estate, 117 Cal. 262, 49 Pac. 172, 711; Kile's Estate, 72 Cal. 133, 13 Pac. 320; Estate of Kilborn, 158 Cal. 593, 112 Pac. 52; Barksdale v. Davis, 114 Ala. 623, 22 South. 17; Fowler v. Young, 19 Kan. 150; Hixon v. West, 83 Ga. 786, 10 S. E. 450.

⁶¹ Ellis v. Crawson, 147 Ala. 294, 41 South. 942; Hays v. Bowdoin, 159 Ala. 600, 49 South. 122.

⁶² Moore v. Heineke, 119 Ala. 627, 24 South. 374.

⁶³ Watson v. Turner, 89 Ala. 220, 8 South. 20.

⁶⁴ Estate of Ricks, 160 Cal. 450, 117 Pac. 532.

A paper offered for probate was alleged to be the last will of the testator. A counter application filed alleged that this paper was not the last will of the deceased, but that it, with another, which contestant offered for probate as a codicil, constituted the last will. The paper offered as a codicil was attacked as a forgery. Held: 1. The burden of proving that the first paper offered for probate was the last

⁶⁵ Lyons v. Campbell, 88 Ala. 462, 7 South. 250; Palmer v. Bradley, 154 Fed. 311, 83 C. C. A. 231; Holmes v. Campbell College, 87 Kan. 597-600, 125 Pac. 25, 4 L. R. A. (N. S.) 1126, Ann. Cas. 1914A, 475.

The grounds of contest usually are:

1. Want of proper execution.⁶⁶
2. Forgery.⁶⁷
3. Incapacity of testator.
4. Mistake.
5. Fraud.
6. Undue influence.

§ 77. Contest is statutory and therefore an action at law

The proceeding is usually classed as an action at law,⁶⁸ although sometimes committed by statute to chancery tribunals, and courts frequently apply equitable principles in incidental aid of the procedure;⁶⁹ for instance, the doctrine of estoppel already discussed. Such a suit carries with it a

will, still rested on those seeking its probate. 2. Having shown that it was executed in such a manner as to authorize its admission to probate, they might rest; those offering the codicil would then have the burden of proving that it was so executed as to make it a part of the will. If evidence was introduced sufficient, if unimpeached, to establish the codicil, it would devolve on those offering the will to overcome such evidence. 3. The burden of proof on the whole case rested upon those offering the first paper for probate, and they were entitled to open and conclude the argument. *Kennedy v. Upshaw*, 64 Tex. 411.

⁶⁶ *Thompson v. Rainer*, 117 Ala. 318, 23 South. 782.

⁶⁷ *Estate of Thomas*, 155 Cal. 488, 101 Pac. 798.

⁶⁸ *Young v. Ridenbaugh*, 67 Mo. 574; *Appleby v. Brock*, 76 Mo. 314; *Gordon v. Burris*, 153 Mo. 223, 54 S. W. 546; *Moore v. McNulty*, 164 Mo. 111, 64 S. W. 159; *Beyer v. Hermann*, 173 Mo. 303, 73 S. W. 164; *Roberts v. Bartlett*, 190 Mo. 695, 89 S. W. 858; *Sayre v. Trustees*, 192 Mo. 120, 90 S. W. 787; *Miller v. Livingstone*, 31 Utah, 415, 88 Pac. 338.

⁶⁹ *Garland v. Smith*, 127 Mo. 583, 28 S. W. 196, 29 S. W. 836.

lis pendens, so that a conveyance made by either heir or devisee pending such a proceeding will be subject to any judgment rendered therein.⁷⁰

The contestants are not permitted to dismiss their action. The court having acquired jurisdiction must proceed to final judgment either for or against the will. A decree of dismissal is erroneous.⁷¹ But on this point there is the usual conflict of decisions.⁷² There is a conflict also on the question whether a will contest may be submitted to arbitration.⁷³

⁷⁰ *McIlwrath v. Hollander*, 73 Mo. 105, 39 Am. Rep. 484.

⁷¹ *Benoist v. Murrin*, 48 Mo. 48; *Harris v. Hays*, 53 Mo. 90; *Jackson v. Hardin*, 83 Mo. 175; *Hughes v. Burriss*, 85 Mo. 665; *McMahon v. McMahon*, 100 Mo. 97, 13 S. W. 208; *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. Rep. 576; *Hogan v. Hinchey*, 195 Mo. 527, 94 S. W. 522; *Bradford v. Blossom*, 207 Mo. 177-228, 105 S. W. 289; *State ex rel. v. McQuillin*, 246 Mo. 674, 152 S. W. 341, Ann. Cas. 1914B, 526.

⁷² *Osborne v. Davies*, 60 Kan. 695, 57 Pac. 941; *Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476.

Will contest may be dismissed for non-payment of costs. *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842.

Executor may withdraw petition for probate. *Woodall v. McLendon*, 137 Ala. 486, 34 South. 406.

⁷³ That it may be. *In re Arbitration of Johnson*, 87 Neb. 375, 127 N. W. 133.

Contra: *Carpenter v. Bailey*, 127 Cal. 582, 60 Pac. 162.

§ 78. Burden of proof

The general rule is that the burden of proof to establish the existence of a valid will is upon the proponents of the will, even though they may be defendants in the contest suit. They must first introduce their proof and must establish by a preponderance of the evidence the existence of the will under which they claim, and they are entitled to the opening and closing address to the jury, just as though they were plaintiffs all the way through.⁷⁴ They must show to the satisfaction of the court

⁷⁴ *Cravens v. Faulconer*, 28 Mo. 19. This position was doubted in *McClintock v. Curd*, 32 Mo. 411; *Farrell v. Brennan*, 32 Mo. 333, 82 Am. Dec. 137. But these cases have been overruled: *Tingley v. Cowgill*, 48 Mo. 291; *Harvey v. Sullens*, 56 Mo. 372; *Benoist v. Murrin*, 58 Mo. 307; *Morton v. Heidorn*, 135 Mo. 608, 37 S. W. 504; *Hardy v. Hardy*, 26 Ala. 524; *Watson v. Turner*, 89 Ala. 220, 8 South. 20; *McCutchen v. Loggins*, 109 Ala. 462, 19 South. 810; *Barnewall v. Murrell*, 108 Ala. 366, 18 South. 831; *Schieffelin v. Schieffelin*, 127 Ala. 33, 28 South. 687; *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548; *Comstock v. Hadlyme*, 8 Conn. 254, 20 Am. Dec. 100; *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470; *Evans v. Arnold*, 52 Ga. 169; *Stancil v. Kenan*, 35 Ga. 102; *Oxford v. Oxford*, 136 Ga. 589, 71 S. E. 883; *Jamison v. Jamison's Will*, 3 Houst. (Del.) 108; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Berst v. Moxom*, 157 Mo. App. 342, 138 S. W. 74; *Id.*, 163 Mo. App. 123, 145 S. W. 857; *Mowry v. Norman*, 223 Mo. 463, 122 S. W. 724; *In re Estate of Van Alstine*, 26 Utah, 193, 72 Pac. 942.

Onus probandi is upon those who seek to divert the property from the legal course of descent. *Mealing v. Pace*, 14 Ga. 596; *Evans v. Arnold*, 52 Ga. 169.

Those who seek to set up a later will or codicil are contestants merely and not proponents of the later will. *Matthews v. Forniss*, 91 Ala. 157, 8 South. 661; *Lyons v. Campbell*, 88 Ala. 462, 7 South. 250; *Knox v. Paull*, 95 Ala. 505, 11 South. 156; *Watson v. Turner*, 89 Ala. 220, 8 South. 20; *Bibb v. Gaston*, 146 Ala. 434, 40 South. 937.

or jury that the execution of the will was attended by every circumstance that the law requires, and which we have been considering as necessary to constitute a valid will. This done, a *prima facie* case is made in favor of the will.⁷⁵ In states where the probated will carries *prima facie* validity the contestants who are seeking to revoke or annul probate are treated as plaintiffs.⁷⁶ Even in such states the proponents are required to make a *prima*

⁷⁵ *Barker's Appeal*, 63 Conn. 402, 27 Atl. 973, 22 L. R. A. 90; *Knox's Appeal*, 26 Conn. 22; *Norton v. Paxton*, 110 Mo. 462, 19 S. W. 807; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *Carl v. Gabel*, 120 Mo. 283, 25 S. W. 214; *McFadin v. Catron*, 138 Mo. 197, 33 S. W. 932, 39 S. W. 771; *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955; *Sehr v. Lindemann*, 153 Mo. 276, 54 S. W. 537; *Riggin v. Westminster College*, 160 Mo. 570, 61 S. W. 803; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *Lorts v. Wash*, 175 Mo. 503, 75 S. W. 95; *Peale v. Ware*, 131 Ga. 826, 63 S. E. 581; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Davis v. Rogers*, 1 Houst. (Del.) 44; *Safe Dep. Co. v. Heiberger*, 19 App. D. C. 506; *Freeman v. Hamilton*, 74 Ga. 317; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Bensberg v. Wash. University*, 251 Mo. 641-656, 158 S. W. 330.

⁷⁶ *Dalrymple's Estate*, 67 Cal. 444, 7 Pac. 906; *Collin's Estate*, Myr. Prob. (Cal.) 73; *Learned's Estate*, 70 Cal. 141, 11 Pac. 587; *Olmsted's Estate*, 122 Cal. 224, 54 Pac. 745; *In re Estate of Hayes*, 55 Colo. 340, 135 Pac. 449; *Willms v. Plambeck*, 76 Neb. 195, 107 N. W. 248; *Scott v. Thrall*, 77 Kan. 688, 95 Pac. 562, 17 L. R. A. (N. S.) 184, 127 Am. St. Rep. 449; *Rich v. Bowker*, 25 Kan. 7; *Franklin v. Boone*, 39 Tex. Civ. App. 597, 88 S. W. 262; *Renn v. Samos*, 33 Tex. 760.

A distinction is made between an appeal from probate and a suit to annul a probated will. In the former the burden of proof remains with proponents. *Seebrock v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Renn v. Samos*, 33 Tex. 760; *Green v. Hewett*, 54 Tex. Civ. App. 534, 118 S. W. 170.

facie case by proving the formal execution of the will after which the burden of the contest is on the contestants,⁷⁷ to prove such issues as they have chosen to raise.⁷⁸ Under either rule the proponents are not required to anticipate any such defenses as mistake, fraud or undue influence. These are what might be termed "affirmative grounds of contest," and proof of them lies upon the party who sets them up.⁷⁹ Their very allegation implies a will otherwise valid and formally executed. The pro-

⁷⁷ *Latour's Estate*, 140 Cal. 414, 73 Pac. 1070, 74 Pac. 441; *McDermott's Estate*, 148 Cal. 43, 82 Pac. 842; *Cordrey v. Cordrey*, 1 *Houst. (Del.)* 269; *Davis v. Rogers*, 1 *Houst. (Del.)* 44; *Credille v. Credille*, 123 Ga. 673, 51 S. E. 628, 107 Am. St. Rep. 157; *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; *Chandler v. Ferris*, 1 *Har. (Del.)* 454; *Emmons v. Garnett*, 18 D. C. 52; *Carri-co v. Kirby*, 3 *Cranch (C. C.)* 594, Fed. Cas. No. 2,442; *Beagley v. Denson*, 40 Tex. 416; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470.

If prima facie case is not made by proponent court must refuse probate, though there be no contest. *Hayden's Estate*, 149 Cal. 680, 87 Pac. 275.

Where will is attacked as forgery, the burden of proving genuineness is upon proponents. *Griffin v. Working Women's Ass'n*, 151 Ala. 597, 44 South. 605; *Venable v. Venable*, 165 Ala. 621, 51 South. 833.

⁷⁸ *Clements v. McGinn*, 4 Cal. Unrep. 163, 33 Pac. 920; *Estate of Latour*, 140 Cal. 414, 73 Pac. 1040, 74 Pac. 414; *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461; *Robinson v. Stuart*, 73 Tex. 267-272, 11 S. W. 275.

⁷⁹ *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *Southworth v. Southworth*, 173 Mo. 59, 73 S. W. 129; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Gordon v. Burris*, 141 Mo. 614, 43 S. W. 642; *Thompson v. Davitte*, 59 Ga. 472; *Steele v. Helm*, 2 *Marv. (Del.)* 237, 43 Atl. 153; *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762; *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733.

Forgery. *Cartwright v. Holcomb*, 21 Okl. 548, 97 Pac. 385.

ponents are also assisted by a general presumption of sanity which comes to the support of the will even when no proof on the subject is offered. The law presumes every man to be sane until the contrary is shown.⁸⁰

⁸⁰ *Copeland's Ex'rs v. Copeland's Heirs*, 32 Ala. 512; *Eastis v. Montgomery*, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227; *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *McDaniel v. Crosby*, 19 Ark. 533; *Binis v. Collier*, 69 Ark. 245, 62 S. W. 593; *Taylor v. McClintock*, 87 Ark. 245, 112 S. W. 405; *Smith v. Boswell*, 93 Ark. 66, 124 S. W. 264; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *Estate of Dolbeers*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Estate of Johnson*, 152 Cal. 778, 93 Pac. 1015; *Barber's Appeal*, 63 Conn. 393, 402, 27 Atl. 973, 22 L. R. A. 90; *Jackson v. Hardin*, 83 Mo. 175; *Norton v. Paxton*, 110 Mo. 462, 19 S. W. 807; *Riggin v. Westminster College*, 160 Mo. 570, 61 S. W. 803. But see *Jones v. Roberts*, 37 Mo. App. 163; *McCulloch v. Campbell*, 49 Ark. 367, 5 S. W. 590; *Wilson's Estate*, 117 Cal. 270, 49 Pac. 172, 711; *Dole's Estate*, 147 Cal. 188, 81 Pac. 534; *Motz Estate*, 136 Cal. 558, 69 Pac. 294; *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795; *Hannigan's Estate*, Myr. Prob. (Cal.) 135; *Councill v. Mayhew*, 172 Ala. 295, 55 South. 314; *Barnewell v. Murrell*, 108 Ala. 366, 18 South. 831; *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72; *O'Donnell v. Rodiger*, 76 Ala. 322, 52 Am. Rep. 322; *Daniel v. Hill*, 52 Ala. 430; *Cotton v. Ulmer*, 45 Ala. 378, 6 Am. Rep. 703; *Stubbs v. Houston*, 33 Ala. 555, overruling *Dunlap v. Robinson*, 28 Ala. 100; *Scott's Estate*, 128 Cal. 57, 60 Pac. 527; *Sturdevant's Appeal*, 71 Conn. 393, 42 Atl. 70; *Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641; *Duffield v. Morris' Ex'r*, 2 Har. (Del.) 375; *Smith v. Day*, 2 Pennewill (Del.) 245, 45 Atl. 396; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *McConnell v. Keir*, 76 Kan. 527-531, 92 Pac. 540; *In re Weber*, 15 Cal. App. 224, 114 Pac. 597.

Contra: "The jury were instructed that 'every man is presumed by the law to possess a sound mind till the contrary be shown by evidence.' This is error. In matters of probate under our law no such presumption is indulged. On the contrary, in order to establish any will, it must affirmatively appear that the deceased was of sound mind when he signed the will." *Beazley v. Denson*, 40 Tex. 416-424.

Burden is upon the proponents of a will to show that the testator

§ 79. Contest—The issue

There is one principle that is as near well settled and uniform among all the courts as any principle can be said to be in the whole tangled and conflicting subject of wills. It is the principle that the probate of a will and all forms of statutory contest of that probate are confined to the single, clear-cut issue, *devisavit vel non*. The sole question to be determined is whether the writing produced be the will of the testator or not. The legality or enforceability of its terms must be left to other and distinct proceedings. The probate of a will, that is, its existence, and the construction and enforcement of its provisions, are not allowed to overlap at any point. In a proceeding to contest a will the court is without power to strike out certain items of the will on the ground that they are illegal ⁸¹ or to construe the meaning of the will ⁸² or to pass upon the question of title.⁸³

was of sound mind and such proof is a requisite of their *prima facie* case, under Missouri statute. *Bensberg v. Wash. University*, 251 Mo. 641, 158 S. W. 330.

⁸¹ *Woodruff v. Hundley*, 127 Ala. 640, 20 South. 98, 85 Am. St. Rep. 145; *Estate of Lennon*, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024; *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055; *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887; *Owens v. Sinklear*, 110 Mo. 54, 19 S. W. 813; *Kultz v. Jaeger*, 29 App. D. C. 300; *Newsome v. Tucker*, 36 Ga. 71; *Newton v. Carbery*, 5 Cranch (C. C.) 626, Fed. Cas. No. 10,189.

⁸² *Russell v. Russell's Ex'rs*, 3 Houst. (Del.) 103; *Robinson v. Duval*, 27 App. D. C. 535.

⁸³ *Adams v. Johnson*, 129 Ga. 611-613, 59 S. E. 269.

§ 80. Contest—Trial by jury

The statutes usually provide for a trial by jury. In some states it is required that the issue be submitted to a jury.⁸⁴ In others the right to demand a jury is given to the parties⁸⁵ or the power to frame an issue for the jury reposed in the court.⁸⁶ Whether the paper tendered is testamentary in its character to take effect on the death of the maker, and whether as such it should be submitted for probate is peculiarly a question for the court. But the questions as to testamentary capacity and free volition of the testator, and whether it was signed and attested as required by law, are questions of fact for the jury.⁸⁷ The court should instruct the jury correctly on the issues presented.⁸⁸

That the validity of the will as a testamentary instrument is submitted to a jury does not imply that

⁸⁴ *Tobin v. Jenkins*, 29 Ark. 151.

⁸⁵ *Mathew v. Forniss*, 91 Ala. 157, 8 South. 661; *In re Robinson*, 106 Cal. 493, 39 Pac. 862; *Linney v. Peloguin*, 35 Tex. 29; *Davis v. Davis*, 34 Tex. 15; *Cockrill v. Cox*, 65 Tex. 669.

If jury is not demanded issue is tried by court. *Shelby v. St. James O. A.*, 66 Neb. 40, 92 N. W. 155; *Miller v. Livingstone*, 31 Utah, 415, 88 Pac. 338.

⁸⁶ *Gallon v. Haas*, 67 Kan. 225, 72 Pac. 770; *Lewis v. Snyder*, 72 Kan. 671, 83 Pac. 621; *Rich v. Bowker*, 25 Kan. 7; *Franks v. Jones*, 39 Kan. 236, 17 Pac. 663; *Hudson v. Hughan*, 56 Kan. 152, 42 Pac. 701; *Osborne v. Davies*, 60 Kan. 695, 57 Pac. 941; *Rash v. Purnel*, 2 Har. (Del.) 448; *Cartwright v. Holcomb*, 21 Okl. 548, 97 Pac. 385; *In re Estate of Van Alstine*, 26 Utah, 193, 72 Pac. 942.

Verdict is advisory only as in courts of equity and may be set aside as against weight of evidence. *In re Jackman*, 26 Wis. 104.

⁸⁷ *Watford v. Forester*, 66 Ga. 738.

⁸⁸ Instruction on testamentary capacity. *In re Kohler*, 79 Cal.

the jury have the right to pass upon the question as to whether the will is in their opinion a proper, just or reasonable disposition of the testator's property. The jury has no such right. This inference is so natural on the part of juries that courts should guard against it by defining the issue with clearness and precision. If the testator be of sound and disposing mind, and has executed his will in conformity with law, free from fraud or undue influence, he is the sole judge of the reasonableness and proprieties of the gifts which he chooses to make or the expectations which he elects to disappoint.

The right to dispose of one's property by will is most solemnly assured by law as an incident to ownership and does not depend upon its judicious use; and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion or because it does not conform to their ideas of what was just and proper.⁸⁹

313, 21 Pac. 758; *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

Instruction on what constitutes a delusion. *Kimberly's Appeal*, 68 Conn. 428, 36 Atl. 847, 37 L. R. A. 261, 57 Am. St. Rep. 101.

Counsel cannot read to the jury the facts of other cases from the reported decisions. *Baldwin's Appeal*, 44 Conn. 40.

⁸⁹ *In re McDevitt*, 95 Cal. 33, 30 Pac. 106; *Langford's Estate*, 108 Cal. 608, 41 Pac. 701; *Spencer's Estate*, 96 Cal. 448, 31 Pac. 453; *Wilson's Estate*, 117 Cal. 270, 49 Pac. 172, 711; *Kaufman's Estate*, 117 Cal. 296, 49 Pac. 192, 59 Am. St. Rep. 179; *Estate of Morey*, 147 Cal. 495, 82 Pac. 57; *Black's Estate*, 132 Cal. 392, 64 Pac. 695; *Tobin v. Jenkins*, 29 Ark. 151; *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Benoist v. Murrin*, 58 Mo. 307; *Coats v. Lynch*, 152 Mo. 168, 53 S. W. 895; *Estate of Higgins*, 156 Cal. 257, 104 Pac. 6; *Coleman v. Robertson's Ex'rs*, 17 Ala. 84; *Hughes v. Hughes*, 31 Ala. 519;

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§ 81. Attesting witnesses

The grounds of a contest are usually either defective execution of the will, want of testamentary capacity, or the existence of fraud or undue influence. As we have seen, the last is affirmative matter of which the burden of proof is on the party alleging it. It will be treated more at large in the next chapter. It being the duty of the proponents of the will to make formal proof of its legal existence, they usually do so by the attesting witnesses.⁹⁰ In case the attesting witnesses are dead or beyond the jurisdiction of the court the statute provides that the affidavits of probate made by them in the probate court may be used.⁹¹ It was originally decided that the testimony of *both* subscribing witnesses was necessary,⁹² but this is not the general rule. If the subscribing witnesses fail to

Mosser v. Mosser's Ex'rs, 32 Ala. 551; Smith v. Day, 2 Pennewill (Del.) 245, 45 Atl. 396; Barbour v. Moore, 4 App. D. C. 535; Martin v. Mitchell, 28 Ga. 382; Gardner v. Lamback, 47 Ga. 133; Franklin v. Belt, 130 Ga. 37, 60 S. E. 146; Wynne v. Harrell, 133 Ga. 616, 66 S. E. 921; Perry v. Rogers, 52 Tex. Civ. App. 594, 114 S. W. 897; Estate of Packer, 164 Cal. 525, 129 Pac. 778.

⁹⁰ Barnewall v. Murrell, 108 Ala. 380, 8 South. 831.

⁹¹ Elliott v. Welby, 13 Mo. App. 19; McConnell v. Keir, 76 Kan. 527-535, 92 Pac. 540; Prather v. McClelland, 76 Tex. 574, 13 S. W. 543; Beeks v. Odom, 70 Tex. 183, 7 S. W. 702.

And may be used for the purpose of impeachment. Spoonemore v. Cables, 66 Mo. 579.

⁹² Withinton v. Withinton, 7 Mo. 589; Bowen v. Neal, 136 Ga. 859, 72 S. E. 340; Evans v. Arnold, 52 Ga. 169.

prove due execution, other evidence may be resorted to,⁹³ or the subscribing witness may be contradicted by other witnesses or by circumstances.⁹⁴

§ 82. Evidence of sanity—Opinion evidence of lay witnesses

Where the question is as to the sanity or mental capacity of testator, the opinions of witnesses who have had an opportunity to judge of his powers are sometimes the best evidence. For this purpose witnesses may be divided into three classes: Attesting witnesses, ordinary lay witnesses, and expert medical witnesses. Each of the three classes are entitled to give opinion evidence in a proper case, but the rule differs as to each.

Attesting witnesses are favored by the law in nearly all jurisdictions. In many states the rule is that:

A subscribing witness to a paper alleged to be a will may, though not an expert, testify to his opinion concerning the

⁹³ *Mays v. Mays*, 114 Mo. 536, 21 S. W. 921; *Morton v. Heidorn*, 135 Mo. 614, 37 S. W. 504; *Craig v. Craig*, 156 Mo. 358, 56 S. W. 1097; *Odenwaelder v. Schorr*, 8 Mo. App. 458; *Snider v. Burks*, 84 Ala. 56, 4 South. 225; *Guice v. Thornton*, 76 Ala. 466; *Rogers v. Diamond*, 13 Ark. 474; *Deupree v. Deupree*, 45 Ga. 415; *Heist v. Universalist G. C.*, 76 Tex. 514, 13 S. W. 552; *Hopf v. State*, 72 Tex. 281, 10 S. W. 589.

⁹⁴ *Barnewall v. Murrell*, 108 Ala. 380, 8 South. 831; *Hall v. Hall*, 38 Ala. 131; *Hughes' Case*, 31 Ala. 519; *Motz Estate*, 136 Cal. 558, 69 Pac. 294; *Estate of Tyler*, 121 Cal. 413, 53 Pac. 928; *Hall v. Hall*, 18 Ga. 40; *Griffin v. Griffin*, R. M. Charl't. (Ga.) 217; *In re Weber*, 15 Cal. App. 224, 114 Pac. 597.

sanity of the alleged testator without stating the facts upon which such opinion is founded.⁹⁵

The opinions of such witnesses, though not controlling, are entitled to great weight, as the law has placed them around the testator to judge, among other things, as to his capacity.⁹⁶ In some states attesting witnesses are upon no different footing than other lay witnesses.⁹⁷ Ordinary witnesses, who are neither attesting witnesses nor medical experts may also give their opinions as to the condition of the testator's mind, but such opinion must be preceded by and based upon facts detailed by the witness to the jury, showing: First, the opportunity of the witness to form a judgment; and, second, the symptoms, habits, acts and other manifestations on the part of the testator on which such judgment is based.⁹⁸

⁹⁵ *Scott v. McKee*, 105 Ga. 256, 31 S. E. 183; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Robinson v. Duvall*, 27 App. D. C. 535-547; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Jamison v. Jamison's Will*, 3 Houst. (Del.) 108.

⁹⁶ *Hall v. Dougherty*, 5 Houst. (Del.) 435; *Ethridge v. Bennett*, 9 Houst. (Del.) 295, 31 Atl. 813; *Garrison v. Blanton*, 48 Tex. 299; *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64.

⁹⁷ Testimony of attesting witnesses has no paramount value as to mental capacity. They stand on same footing as other witnesses who may have observed testator at the time will was executed. *Crandall's Appeal*, 63 Conn. 367, 28 Atl. 531, 38 Am. St. Rep. 375; *Hughes v. Hughes*, 31 Ala. 519.

⁹⁸ *Fish v. Poorman*, 85 Kan. 237, 116 Pac. 898; *Howard v. Carter*, 71 Kan. 85-91, 80 Pac. 61; *Walker v. Walker*, 14 Ga. 242; *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1; *Turner v. Am. Sec. & T. Co.*, 29 App. D. C. 460; *Dennis v. Weekes*, 51 Ga.

Witnesses who bear close family, social or business relations with testator possess the most favorable opportunities for knowing his mental condition, and usually their testimony as to his mental capacity is entitled to great weight.⁹⁹ They should not, however, be asked if they think his mind is

24; *Macafee v. Higgins*, 31 App. D. C. 355; *Brown v. McBride*, 129 Ga. 92, 58 S. E. 702; *Mosley v. Fears*, 135 Ga. 71, 68 S. E. 804; *In re Estate of Wilson*, 78 Neb. 758, 111 N. W. 788; *Isaac v. Halderman*, 76 Neb. 823, 107 N. W. 1016; *Garrison v. Blanton*, 48 Tex. 299; *Cockrill v. Cox*, 65 Tex. 669; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606; *Id.*, 87 Tex. 140, 26 S. W. 1059; *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428; *Miller v. Livingston*, 36 Utah, 228, 102 Pac. 996; *Farrell v. Brennan*, 32 Mo. 328, 82 Am. Dec. 137; *Appleby v. Brock*, 76 Mo. 314; *Baughman v. Baughman*, 32 Kan. 538, 4 Pac. 1003; *Turner v. Am. Security & Tr. Co.*, 213 U. S. 257, 29 Sup. Ct. 420, 53 L. Ed. 788, affirming 29 App. D. C. 460; *Stubbs v. Houston*, 33 Ala. 555; *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *Abraham v. Wilkins*, 17 Ark. 292; *McDaniel v. Crosby*, 19 Ark. 533; *Roberts v. Trawick*, 13 Ala. 68; *Florey's Ex'r v. Florey*, 24 Ala. 241; *Fountain v. Brown*, 38 Ala. 72; *Moore v. Spier*, 80 Ala. 129; *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *Brook's Estate*, 54 Cal. 471; *Carpenter's Estate*, 79 Cal. 382, 21 Pac. 835; *Taylor's Estate*, 92 Cal. 564, 28 Pac. 603; *Wax's Estate*, 106 Cal. 343, 39 Pac. 624; *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *Shanley's Appeal*, 62 Conn. 330, 25 Atl. 245; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310.

Trained nurse may give her opinion of testator's sanity, based on personal observations. *Estate of Budan*, 156 Cal. 230, 104 Pac. 442; *Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

⁹⁹ *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035.

Divorced wife as witness to mental capacity. *In re Estate of Van Alstine*, 26 Utah, 193, 72 Pac. 942.

The surviving wife, contesting the probate of her husband's will on the ground that it was made under the influence of an insane delusion concerning her, could not introduce in evidence confidential letters to her by the deceased husband as evidence of his state of mind toward her; these being confidential communications between husband and wife. *Lanham v. Lanham*, 105 Tex. 91, 145 S. W. 336.

sound enough to make a will as that is the question for the jury to determine.¹ Mere opinions of witnesses unaccompanied by evidence of facts upon which such opinion is based, are not sufficient to show incapacity,² much less can testamentary incapacity be shown by neighborhood rumors.³ The opinion is only valuable so far as it is supported by the facts detailed.⁴

¹ *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *Hamon v. Hamon*, 180 Mo. 698, 79 S. W. 422; *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; *Franklin v. Boone*, 39 Tex. Civ. App. 597, 88 S. W. 262.

² *Appleby v. Brock*, 76 Mo. 314; *Sehr v. Lindemann*, 153 Mo. 288, 54 S. W. 537; *Wood v. Carpenter*, 166 Mo. 487, 66 S. W. 172; *Wilson v. Jackson*, 167 Mo. 155, 66 S. W. 972; *Crowson v. Crowson*, 172 Mo. 700-702, 72 S. W. 1065; *Southworth v. Southworth*, 173 Mo. 73, 73 S. W. 129; *Zirkle v. Leonard*, 61 Kan. 636, 60 Pac. 318; *Bowling v. Bowling*, 8 Ala. 538; *Raub v. Carpenter*, 187 U. S. 159, 23 Sup. Ct. 72, 47 L. Ed. 119; *Pritchard v. Henderson*, 3 Pennewill (Del.) 128, 50 Atl. 217; *Raub v. Carpenter*, 17 App. D. C. 505; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Jamison v. Jamison's Will*, 3 Houst. (Del.) 108.

³ *Brinkman v. Rueggesick*, 71 Mo. 553; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Hughes v. Hughes*, 31 Ala. 519.

Treatment of deceased by her family and others as evidence of her lack of mental capacity. *Estate of De Laveagas*, 165 Cal. 607, 133 Pac. 307.

⁴ *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Newton v. Carbery*, 5 Cranch (C. C.) 626, Fed. Cas. No. 10,189; *Turner v. Am. Sec. & Tr. Co.*, 29 App. D. C. 460.

Who is an "intimate acquaintance" under California Code. *Carpenter's Estate*, 127 Cal. 582, 60 Pac. 162; *In re Crozier*, 74 Cal. 180, 15 Pac. 618; *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461; *Huyck v. Rennie*, 151 Cal. 411, 90 Pac. 929; *Estate of Huston*, 163 Cal. 166, 124 Pac. 852.

§ 83. Evidence of sanity—Medical witnesses

Medical witnesses may testify to the effect of disease on the mind and give their opinion of mental capacity.⁵ Generally they may do this upon hypothetical questions based upon the evidence of others,⁶ but in some states expert opinion evidence, based upon hypothetical questions, and not upon personal observation, is considered of no value.⁷

§ 84. Evidence of sanity—Declarations of testator

Evidence of declarations made by the testator, as to the execution or nonexecution of the will is not admissible⁸ as evidence of the truth of the

⁵ *Taylor v. McClintock*, 87 Ark. 245, 112 S. W. 405; *Councill v. Mayhew*, 172 Ala. 295, 55 South. 314; *In re Flint*, 100 Cal. 391, 34 Pac. 853; *Jamison v. Jamison's Will*, 3 Houst. (Del.) 108; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 143.

Certificates of physicians for the commitment of the testator to an insane asylum in a foreign country are not admissible as their depositions could be taken giving opportunity for cross-examination. *Kelly v. Moore*, 22 App. D. C. 9.

⁶ *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

⁷ *Estate of Higgins*, 156 Cal. 257, 104 Pac. 6; *Barber's Appeal*, 63 Conn. 393, 27 Atl. 973, 22 L. R. A. 90; *Tingley v. Cowgill*, 48 Mo. 291; *Lorts v. Wash*, 175 Mo. 497, 75 S. W. 95; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932.

Winn v. Grier, 217 Mo. 420, 117 S. W. 48; *King v. Gilson*, 206 Mo. 264, 104 S. W. 52.

⁸ *Gibson v. Gibson*, 24 Mo. 227; *Cawthorn v. Haynes*, 24 Mo. 236; *McFadin v. Catron*, 120 Mo. 274, 25 S. W. 506; *Walton v. Kendrick*, 122 Mo. 504, 27 S. W. 872, 25 L. R. A. 701; *Jones v. Roberts*, 37 Mo. App. 181; *Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476; *Throckmorton v. Holt*, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663; *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655; *Estate of McDevitt*, 95 Cal. 17, 30

facts stated, whether made before the date of the will⁹ or after,¹⁰ unless part of the *res gestæ*.¹¹ But such declarations may be admitted for the purpose of showing the condition of the testator's mind,¹²

Pac. 101; Kaufman's Estate, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; Gregory's Estate, 133 Cal. 131, 65 Pac. 315; Holt's Estate, 146 Cal. 77, 79 Pac. 585; Utermehle v. Norment, 22 App. D. C. 31; Johnson v. Brown, 51 Tex. 65; Kennedy v. Upshaw, 64 Tex. 411-418; Provis v. Reed, 5 Bing. 435; Meeker v. Boylan, 28 N. J. Law, 285.

Declarations of testator are inadmissible on issue of forgery. Leslie v. McMurtry, 60 Ark. 301, 30 S. W. 33; Flowers v. Flowers, 74 Ark. 212, 85 S. W. 242.

Contra: Riddle v. Gibson, 29 App. D. C. 237; Throckmorton v. Holt, 12 App. D. C. 552.

But evidence is admissible that testator knew of facts at variance with the statements contained in the alleged will. Estate of Thomas, 155 Cal. 488, 101 Pac. 798; Kennedy v. Upshaw, 64 Tex. 411.

Declarations of a testator as to how he acquired his property are not relevant on issue of probate. Ormsby v. Webb, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805.

⁹ Tingley v. Cowgill, 48 Mo. 298.

¹⁰ Spoonemore v. Cables, 66 Mo. 587; Wells v. Wells, 144 Mo. 198, 45 S. W. 1095; Rich v. Bowker, 25 Kan. 7; Lippard v. Humphrey, 28 App. D. C. 355.

¹¹ Schnee v. Schnee, 61 Kan. 643, 60 Pac. 738; Nelson v. McClanahan, 55 Cal. 308.

Or in case of a lost will. Mann v. Balfour, 187 Mo. 305, 86 S. W. 103.

¹² Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; Estate of Chevallier, 159 Cal. 161, 113 Pac. 130; Seibert v. Hatcher, 205 Mo. 83, 102 S. W. 962; Mallery v. Young, 94 Ga. 804, 22 S. E. 142; Credille v. Credille, 123 Ga. 673, 51 S. E. 628, 107 Am. St. Rep. 157; Davis v. Rogers, 1 Houst. (Del.) 44; Brown v. Mitchell, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; Williamson v. Nabers, 14 Ga. 286; Miller v. Livingston, 36 Utah, 228, 102 Pac. 996.

Parol evidence of a testator's previous declarations is admissible not to explain, alter or contradict the will but simply to show, as presumptive evidence of testamentary capacity, long-continued ex-

or the state of his affections.¹³ A former will is admissible for a like purpose,¹⁴ and the will in contest may be used as evidence of the testator's mental capacity.¹⁵

pressions of a purpose to dispose of his property in a particular way. For the same reason it is admissible to rebut the presumption of undue influence. *Williamson v. Nabers*, 14 Ga. 286.

¹³ Declarations of testator, whether made before or after the execution of the will, if not too remote, are admissible to shed light upon his mental condition, his memory, intentions, idiosyncrasies, prejudices, affections and the objects of his bounty. *Coghill v. Kennedy*, 119 Ala. 663, 24 South. 459; *Bunyard v. McElroy*, 21 Ala. 311; *Seale v. Chambliss*, 35 Ala. 19; *Hughes v. Hughes*, 31 Ala. 519; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 South. 687; *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268; *Roberts v. Trawick*, 17 Ala. 55, 52 Am. Dec. 164; *Rule v. Maupin*, 84 Mo. 587; *Thompson v. Ish*, 99 Mo. 170, 12 S. W. 510, 17 Am. St. Rep. 552; *McFadin v. Catron*, 120 Mo. 266, 25 S. W. 506; *Crowson v. Crowson*, 172 Mo. 703, 72 S. W. 1065; *Bush v. Bush*, 87 Mo. 480; *Mooney v. Olsen*, 22 Kan. 69; *Denison's Appeal*, 29 Conn. 402; *Johnson v. Brown*, 51 Tex. 65; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233.

Diaries kept by testator or letters written by him after date of will are evidence of his mental state. *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *Barber's Appeal*, 63 Conn. 410, 27 Atl. 973, 22 L. R. A. 90; *Robinson v. Stuart*, 73 Tex. 267, 11 S. W. 275; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

Declarations of testator on his own sanity have little weight. *Lang's Estate*, 65 Cal. 19, 2 Pac. 491; *Clements v. McGinn*, 4 Cal. Unrep. 163, 33 Pac. 920.

¹⁴ *Thompson v. Ish*, 99 Mo. 170, 12 S. W. 510, 17 Am. St. Rep. 552; *Couch v. Gentry*, 113 Mo. 252, 20 S. W. 890; *McFadin v. Catron*, 120 Mo. 266, 25 S. W. 506; *Farmer v. Farmer*, 129 Mo. 539, 31 S. W. 926; *Von de Veld v. Judy*, 143 Mo. 354, 44 S. W. 1117; *Tobin v. Jenkins*, 29 Ark. 151; *Hughes v. Hughes, Ex'r*, 31 Ala. 519; *Seale v. Chamblis*, 35 Ala. 19; *Current v. Current*, 244 Mo. 429, 148 S. W. 860; *Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641; *Brown v. Mitchell*, 87 Tex. 140, 26 S. W. 1059.

¹⁵ *Wood v. Carpenter*, 166 Mo. 465, 66 S. W. 172; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Roberts v. Bartlett*, 190 Mo.

§ 85. Evidence of sanity—Range of testimony

Though the question is the mental capacity of the testator at the time of the execution of the will, necessarily, a wide range of evidence is admissible.¹⁶ The mental condition of the testator before and after the date of the will may be enquired into,¹⁷ for the purpose of showing a continuance of a prior state of insanity,¹⁸ or of showing a change

699, 89 S. W. 858; *Couch v. Couch*, 7 Ala. 519, 42 Am. Dec. 602; *Estate of Higgins*, 156 Cal. 257, 104 Pac. 6; *Denison's Appeal*, 29 Conn. 405; *Crandall's Appeal*, 63 Conn. 367, 28 Atl. 531, 38 Am. St. Rep. 375; *Roberts v. Trawick*, 13 Ala. 68; *Stubbs v. Houston*, 33 Ala. 555; *Coleman v. Robertson's Ex'x*, 17 Ala. 84; *Lucas v. Parsons*, 24 Ga. 640, 71 Am. Dec. 147; *Griffin v. Griffin*, R. M. Charl. (Ga.) 217; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

In determining which of two wills executed by the same testator on the same day was executed last, extrinsic evidence should not be considered when intrinsic evidence exists. *St. Mary's O. A. v. Masterson*, 57 Tex. Civ. App. 646, 122 S. W. 587.

An unequal division of testator's property raises no presumption of fraud or mental incapacity. *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *Chandler v. Jost*, 96 Ala. 596, 11 South. 636; *Coleman v. Robertson*, 17 Ala. 87. But is an element to corroborate other evidence. *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543; *Morgan v. Morgan*, 30 App. D. C. 436, 13 Ann. Cas. 1037; *Pergason v. Etcherson*, 91 Ga. 785, 18 S. E. 29; *In re Estate of Hayes*, 55 Colo. 340, 135 Pac. 449.

¹⁶ *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405; *Steele v. Helm*, 2 Marv. (Del.) 237, 43 Atl. 153; *Naylor v. McRuer*, 248 Mo. 423, 154 S. W. 772.

¹⁷ *Moore v. Spier*, 80 Ala. 129; *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *Holton v. Cochran*, 208 Mo. 314, 106 S. W. 1035.

¹⁸ *Dole's Estate*, 147 Cal. 188, 81 Pac. 534; *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83; *Dalrymple's Estate*, 67 Cal. 444, 7 Pac. 906; *Wilson's Estate*, 117 Cal. 276, 49 Pac. 172, 711; *Pritchard v. Henderson*, 3 Pennewill (Del.) 128, 50 Atl. 217; *Ball v. Kane*, 1 Pennewill (Del.) 90, 39 Atl. 778.

from soundness to unsoundness.¹⁹ The law permits the evidence to cover a long space of time in either direction. It weakens as the time lengthens and at last ceases to be of any force. It is for the jury to determine its weight under proper instructions of the court.²⁰

Evidence of the insanity of relatives is generally admissible on the recognized principle of the hereditary character of insanity, but only in corroboration of proof that the particular person is or was

¹⁹ *Carpenter's Estate*, 79 Cal. 382, 21 Pac. 835; *Shanley's Appeal*, 62 Conn. 330, 25 Atl. 245.

An agreement entered into by three sons in regard to the care of their mother's property and reciting her great age and incapacity to manage her property is admissible on issue of testamentary capacity. *Dale's Appeal*, 57 Conn. 127, 17 Atl. 757.

Petition for guardianship of the estate and person of the testator filed by proponent is admissible on issue of testamentary capacity. *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

An adjudication of incompetency and appointment of guardian for testator eleven days after making the will, while not conclusive, is proper evidence on testamentary capacity. *Estate of Loveland*, 162 Cal. 595, 123 Pac. 801.

Where the mental derangement or its cause is continuing or permanent in character previous insanity may be shown, and the objection of remoteness does not apply. *Fish v. Poorman*, 85 Kan. 237, 116 Pac. 898.

²⁰ *Dale's Appeal*, 57 Conn. 127-143, 17 Atl. 757; *Cullum v. Colwell*, 85 Conn. 459, 83 Atl. 695.

Capacity of a testator to make the will is to be decided by the state of his mind at the time it was executed; and to shed light on that question, evidence showing the condition of the testator's mind long prior, closely approaching and shortly subsequent to the execution of the will is competent. Court may set the limit of time after the making of the will within which evidence of unsoundness of mind will be received. *In re Estate of Winch*, 84 Neb. 251, 121 N. W. 116, 8 Ann. Cas. 903.

insane. But proof of a taint of insanity in a person's family, without actual evidence of insanity in the person himself, will never be allowed to overcome the presumption of his sanity.²¹

§ 86. Privilege of physicians and attorneys

At common law and under the statutes of most states a physician whose information was acquired in attendance upon a patient in a professional capacity cannot testify as to the facts thus learned, unless the privilege is waived by the patient. The question is by whom this privilege may be waived after the death of the testator—the patient. Some courts hold that the privilege does not exist in a will contest,²² others, that the attending physician may testify at the instance of either party to the contest,²³ others, that the privilege cannot be waived

²¹ *Fish v. Poorman*, 85 Kan. 237, 116 Pac. 898; *Snow v. Benton*, 28 Ill. 306; *Bradley v. State*, 31 Ind. 492; *People v. Smith*, 31 Cal. 466.

Evidence that testator's father never showed trace of insanity admissible. *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695, 9 Ann. Cas. 795.

Insanity evidence. *Chambers v. Elliott*, 161 Mo. App. 479, 143 S. W. 521.

²² *Shapter's Estate*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.) 575, 117 Am. St. Rep. 216.

²³ *Thompson v. Ish*, 99 Mo. 160–173, 12 S. W. 510, 17 Am. St. Rep. 552; *Hamilton v. Crowe*, 175 Mo. 634, 75 S. W. 389; *Estate of Gray*, 88 Neb. 835, 130 N. W. 746, 33 L. R. A. (N. S.) 319, Ann. Cas. 1912B, 1037; *Denning v. Butcher*, 91 Iowa, 425, 59 N. W. 69; *Winters v. Winters*, 102 Iowa, 53, 71 N. W. 184, 63 Am. St. Rep. 428; *In re Walker's Will*, 150 Iowa, 284, 128 N. W. 386, 129 N. W. 952; *In re Estate of Shapter*, 35 Colo. 578, 85 Pac. 688, 6 L. R. A. (N. S.)

even by the heirs of the patient.²⁴ The same privilege extends to attorneys,²⁵ but out of the necessities of the case in a will contest the same exceptions have arisen as in the case of a physician. The privilege is impliedly waived where the testator has made the attorney an attesting witness,²⁶ and in many states the privilege is held not to extend to the attorney who drafted the will.²⁷

575, 117 Am. St. Rep. 216; *Olson v. Court of Honor*, 100 Minn. 117, 110 N. W. 374, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622.

²⁴ *In re Flint*, 100 Cal. 391, 34 Pac. 863; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *Estate of Budan*, 156 Cal. 230, 104 Pac. 442; *Estate of Huston*, 163 Cal. 166, 124 Pac. 852; *In re Will of Hunt*, 122 Wis. 460, 100 N. W. 874; *In re Estate of Van Alstine*, 26 Utah, 193, 72 Pac. 942; *Auld v. Cathro*, 20 N. D. 461, 128 N. W. 1025, 32 L. R. A. (N. S.) 71, Ann. Cas. 1913A, 90.

²⁵ *Estate of Higgins*, 156 Cal. 257, 104 Pac. 6; *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310; *McIntosh v. Moore*, 22 Tex. Civ. App. 22, 53 S. W. 611.

That a Catholic priest testifies as to mental condition of testator does not violate secrets of confessional. *Estate of Toomes*, 54 Cal. 509, 35 Am. Rep. 83.

²⁶ *Brown v. Brown*, 77 Neb. 125, 108 N. W. 180; *Elliott v. Elliott*, 3 Neb. (Unof.) 832, 92 N. W. 1006.

In re Mullin, 110 Cal. 252, 42 Pac. 645; *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202.

²⁷ *Heist v. Universalist G. C.*, 76 Tex. 514, 13 S. W. 552; *Emerson v. Scott*, 39 Tex. Civ. App. 65, 87 S. W. 369; *In re Young's Estate*, 33 Utah, 382, 94 Pac. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596; *Scott v. Harris*, 113 Ill. 447; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188, 34 Am. St. Rep. 258; *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760; *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100, 66 Am. St. Rep. 202; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *McMaster v. Scriven*, 85 Wis. 162, 55 N. W. 149, 39 Am. St. Rep. 828; *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286.

An attorney is not bound by his obligation to preserve silence as to

§ 87. Admissibility of various matters

The devisees under the will being necessary parties to the contest, their admissions were at one time considered admissible against the validity of the will, as the admissions of other parties are admissible against their interests.²⁸ But as the interests of the devisees are usually distinct the courts have seen to what absurdities it would lead if the admissions of one were made binding on the others, and such admissions are not now received,²⁹ unless where the proponent is the sole legatee and executor under the will.³⁰

a privilege communication, when the client or his representative charges him directly or indirectly with fraud or other improper or unprofessional conduct in the preparation of a will. *Olmstead v. Webb*, 5 App. D. C. 38.

²⁸ *Armstrong v. Farrar*, 8 Mo. 627; *Williamson v. Nabers*, 14 Ga. 286-308; *Harvey v. Anderson*, 12 Ga. 69.

²⁹ *Roberts v. Trawick*, 13 Ala. 68; *Id.*, 17 Ala. 55, 52 Am. Dec. 164; *Walker v. Jones*, 23 Ala. 448; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Blakey v. Blakey*, 33 Ala. 611; *Leslie v. Sims*, 39 Ala. 161; *Estate of Dolbeer*, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207; *Schierbaum v. Schemme*, 157 Mo. 17, 57 S. W. 526, 80 Am. St. Rep. 604; *Wood v. Carpenter*, 166 Mo. 485, 66 S. W. 172; *King v. Gilson*, 191 Mo. 307, 90 S. W. 367; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932; *Estate of De Laveaga*, 165 Cal. 607, 133 Pac. 307.

Admissions or declarations of strangers in interest are not admissible. *McKenna's Estate*, 143 Cal. 580, 77 Pac. 461.

Declarations or admissions of a beneficiary under a will are admissible only for the purpose of impeaching or discrediting his testimony. *Robinson v. Duvall*, 27 App. D. C. 535.

³⁰ *Seale v. Chambliss*, 35 Ala. 19; *Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 465; *Dennis v. Weekes*, 46 Ga. 514.

Admissions of legatee may estop him from claiming any interest under will. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

Evidence of the financial condition of the parties is admissible within reasonable bounds,³¹ and of the quantity and character of the testator's estate,³² and the manner in which the testator acquired it.³³

In cases where the defects of the testator or his surroundings give rise to special opportunities for imposition, as where the testator is blind, ignorant, or unfamiliar with the language, or where the draftsman of the will is the principal beneficiary it is sometimes required that there be affirmative evidence that the testator knew the contents of the will.³⁴

³¹ *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Mowry v. Norman*, 223 Mo. 463, 122 S. W. 724.

³² *Young v. Ridenbaugh*, 67 Mo. 574; *Hodge v. Rambo*, 155 Ala. 175, 45 South. 678.

³³ *Ruffino's Estate*, 116 Cal. 317, 48 Pac. 127; *Wilson's Estate*, 117 Cal. 280, 49 Pac. 172, 711.

The proponent of a will, as a party to the proceeding, has a constitutional right to be present at the trial, and consequently is not subject to the order excluding the witnesses. *Barker v. Bell*, 49 Ala. 284.

³⁴ *Davis v. Rogers*, 1 *Houst. (Del.)* 44-96; *Harvey v. Anderson*, 12 Ga. 69; *Avaro v. Avaro*, 235 Mo. 424, 138 S. W. 500.

Statute of Kansas requires that where will is written or prepared by sole or principal beneficiary it must be affirmatively shown that testator knew contents and had independent advice.

"Principal beneficiary" defined. *Kelty v. Burgess*, 84 Kan. 678, 115 Pac. 583; *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214.

Forgery. *Mobley v. Lyon*, 134 Ga. 125, 67 S. E. 668, 137 Am. St. Rep. 213, 19 Ann. Cas. 1004.

No evidence of forgery. *Storey v. Storey*, 30 App. D. C. 41

§ 88. Contest—Directing a verdict

Although the issue is tried to a jury, the court has the same power of directing a verdict where there is no substantial conflict in the evidence as it has in other civil cases.³⁵ Upon this principle the courts will give a peremptory instruction to the jury to find in favor of the will where a *prima facie* case is made by the proponents and there is no substantial evidence to sustain the contest.³⁶ The court should withdraw from the jury issues that are not contested, or upon which there is no substantial evidence,³⁷ and should set aside the finding of the

³⁵ *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130; *Carpenter's Estate*, 127 Cal. 582, 60 Pac. 162; *Nelson's Estate*, 132 Cal. 182, 64 Pac. 294; *Estate of Dole*, 147 Cal. 188, 81 Pac. 534; *Leach v. Burr*, 188 U. S. 510, 23 Sup. Ct. 393, 47 L. Ed. 567; *Butcher v. Butcher*, 21 Colo. App. 416, 122 Pac. 397; *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548; *Beyer v. Schlenker*, 150 Mo. App. 671, 131 S. W. 465; *In re Estate of Kuhman*, 94 Neb. 783, 144 N. W. 778.

³⁶ *Jackson v. Hardin*, 83 Mo. 175; *Maddox v. Maddox*, 114 Mo. 35, 21 S. W. 499, 35 Am. St. Rep. 734; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Riley v. Sherwood*, 144 Mo. 369, 45 S. W. 1077; *Sehr v. Lindemann*, 153 Mo. 290, 54 S. W. 537; *Martin v. Bowdern*, 158 Mo. 393, 59 S. W. 227; *Wood v. Carpenter*, 166 Mo. 487, 66 S. W. 172; *Catholic University v. O'Brien*, 181 Mo. 93, 79 S. W. 901; *Doherty v. Gilmore*, 136 Mo. 416, 37 S. W. 1127; *Gordon v. Burris*, 141 Mo. 614, 43 S. W. 642; *Estate of Morey*, 147 Cal. 495, 82 Pac. 57; *Leach v. Burr*, 17 App. D. C. 128; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932.

The court is more cautious in directing a verdict *against* the will. *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548.

³⁷ *Dalrymple's Estate*, 67 Cal. 444, 7 Pac. 906; *Learned's Estate*, 70 Cal. 141, 11 Pac. 587; *Estate of Higgins*, 156 Cal. 257, 104 Pac.

jury when not supported by the evidence.³⁸ In determining whether to direct a nonsuit, every intendment must be made in contestant's favor.³⁹ If there is any substantial evidence tending to prove the facts necessary to sustain the contest, the contestants are entitled to have the case go to the jury for a verdict on the merits.⁴⁰

6; *Burrell's Estate*, 77 Cal. 479, 19 Pac. 880; *Spencer's Estate*, 96 Cal. 448, 31 Pac. 453; *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762; *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733; *Birdseye's Appeal*, 77 Conn. 623, 60 Atl. 111; *Stancell v. Kenan*, 33 Ga. 56; *Weber v. Strobel*, 236 Mo. 649, 139 S. W. 188.

³⁸ *McElroy v. McElroy*, 5 Ala. 81; *Ex parte Edward Henry*, 24 Ala. 638; *In re Carriger*, 104 Cal. 81, 37 Pac. 785; *Motz's Estate*, 136 Cal. 558, 69 Pac. 294; *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058.

While court cannot set aside a judgment in a will contest on the motion of a stranger it may do so on its own motion, although on facts suggested by a stranger. *Ewart v. Peniston*, 233 Mo. 695, 136 S. W. 422.

³⁹ *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252; *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532; *Morgan v. Adams*, 29 App. D. C. 198; *Riddle v. Gibson*, 29 App. D. C. 237; *Kultz v. Jaeger*, 29 App. D. C. 300; *Olmstead v. Webb*, 5 App. D. C. 38; *Bensberg v. Wash. University*, 251 Mo. 641, 158 S. W. 330.

⁴⁰ *Loob v. Fenaughty*, 60 Kan. 570, 55 Pac. 841; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307; *Wehe v. Mood*, 68 Kan. 373, 75 Pac. 476; *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15; *Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641; *Id.*, 223 Mo. 463, 122 S. W. 724; *Buford v. Gruber*, 223 Mo. 231, 122 S. W. 717; *Hayes v. Hayes*, 242 Mo. 155, 145 S. W. 1155; *Crum v. Crum*, 231 Mo. 626, 132 S. W. 1070; *Naylor v. McRuer*, 248 Mo. 423, 154 S. W. 772; *In re Daly*, 15 Cal. App. 329, 114 Pac. 787.

§ 89. Contest—Judgment—Costs

The only judgment to be rendered on a contest is one against the validity of the will or one sustaining the validity of the will.⁴¹ It has been held that a judgment annulling the probate only as to the interest of the contestant is void, if the issue be lack of mental capacity or proper execution of will.⁴² A will contest is intended to be final and is *res adjudicata*.⁴³ If the will disposes of real property the effect of its establishment is to make it a muniment of title, and therefore an appeal from a contest on such a will goes to the supreme court, as affecting the title to real property.⁴⁴

It seems that the matter of allowing costs to be taxed against the estate is largely within the discretion of the court, and that no one is entitled to have such costs taxed as a matter of right.⁴⁵ The

⁴¹ *Woodruff v. Hundley*, 127 Ala. 655, 29 South. 98, 85 Am. St. Rep. 145.

⁴² *Freud's Estate*, 73 Cal. 555, 15 Pac. 135.

But a decree annulling a will on the ground of mental incapacity of testator, upon the application of a minor heir within one year after his disabilities are removed, operates upon the interest of the applicant only. It does not act in favor of those heirs who have lost their right to contest the will by lapse of time. *Samson v. Samson*, 64 Cal. 327, 30 Pac. 979; *Hines v. Hines*, 243 Mo. 480, 147 S. W. 774.

One contestant, however, has right to appeal. *Metzger v. Steed*, 132 Ga. 822, 65 S. E. 117.

⁴³ *Teckenbrock v. McLaughlin*, 246 Mo. 711, 152 S. W. 38; *Moss v. Helsley*, 60 Tex. 426; *Davis v. Rogers*, 1 Houst. (Del.) 183.

⁴⁴ *Bingaman v. Hannah*, 171 Mo. App. 186, 156 S. W. 496.

⁴⁵ *Estate of Dillon*, 149 Cal. 683, 87 Pac. 379; *Venable v. Venable*,

reasonable costs and expenses incurred by an executor in propounding for probate a paper purporting to be the last will of the deceased are a proper charge against the estate if the executor acted in good faith.⁴⁶ And the administrator of a supposed intestate estate who resists unsuccessfully the probate of a will may be entitled to the same consideration.⁴⁷ But, broadly speaking, parties to a will contest must bear their own costs.⁴⁸ The cases are rare that would justify the court in ordering the costs of an unsuccessful contestant paid out of the estate.⁴⁹

165 Ala. 621, 51 South. 833; *Coulton v. Pope*, 77 Neb. 882, 110 N. W. 630; *In re Clapham's Estate*, 73 Neb. 492, 103 N. W. 61.

⁴⁶ *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590; *Comstock v. Hadlyme*, 8 Conn. 254, 20 Am. Dec. 100; *McIntire v. McIntire*, 14 App. D. C. 337; *Baker v. Bancroft*, 79 Ga. 672, 5 S. E. 46; *Browne v. Rogers*, 1 Houst. (Del.) 458; *Kengla v. Randall*, 22 App. D. C. 463; *Tuckerman v. Currier*, 54 Colo. 25, 129 Pac. 210; *Smullin v. Wharton*, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441.

Executor may be allowed attorney fees. *Gairdner v. Tate*, 110 Ga. 456, 35 S. E. 697; *Kengla v. Randall*, 22 App. D. C. 463.

⁴⁷ *Bradley v. Andreas*, 30 Ala. 80.

⁴⁸ *Leavenworth v. Marshall*, 19 Conn. 408; *Estate of Soulard*, 141 Mo. 642, 43 S. W. 617; *Cash v. Lust*, 142 Mo. 630, 44 S. W. 724, 64 Am. St. Rep. 576.

⁴⁹ *Estate of Bump*, 152 Cal. 271, 92 Pac. 642; *Francis v. Holbrook*, 68 Ga. 829; *Williams v. Tolbert*, 66 Ga. 127.

Costs denied. *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798.

Attorneys fees denied. *McClary v. Stull*, 44 Neb. 175, 62 N. W. 501; *Clark v. Turner*, 50 Neb. 290, 69 N. W. 843, 38 L. R. A. 433; *Atkinson v. May's Estate*, 57 Neb. 137, 77 N. W. 343.

The courts are not invested with the discretion to award costs or attorney's fees to an unsuccessful contestant of a will simply and solely because of the fact that he undertook the contest in good

§ 90. Contest—Appellate courts

The action being one at law, and some statutes specially requiring the submission of the issues to a jury, the appellate court disclaims any power to weigh conflicting testimony or to disturb the finding of the jury where there is evidence to sustain the contest.⁵⁰ But it will examine the record to determine whether there is any evidence to support the verdict, and may order a will to be established which has been rejected by a jury, or may set aside a will which has been established, or grant a new trial.⁵¹

faith and at the time there existed probable cause therefor. *Wallace v. Sheldon*, 56 Neb. 55, 76 N. W. 418, overruling *Mathis v. Pitman*, 32 Neb. 191, 49 N. W. 182; *Seebrock v. Fedawa*, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488.

⁵⁰ *McKenna's Estate*, 143 Cal. 580, 77 Pac. 461; *Tibbett's Estate*, 137 Cal. 123, 69 Pac. 978; *Estate of Nelson*, 132 Cal. 182, 64 Pac. 294; *Estate of Doolittle*, 153 Cal. 29, 94 Pac. 240; *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598; *Merrill v. Morrisett*, 76 Ala. 433; *Jaques v. Horton*, 76 Ala. 238; *Venable v. Venable*, 165 Ala. 621, 51 South. 833; *Hill v. Boyd*, 199 Mo. 438, 97 S. W. 918; *Hamburger v. Rinkel*, 164 Mo. 398, 64 S. W. 104; *Morgan v. Adams*, 29 App. D. C. 198; *Long v. Boyer*, 88 Kan. 664, 129 Pac. 943; *Fuller v. Brakefield*, 84 Ga. 459, 10 S. E. 1086; *Berst v. Moxom*, 157 Mo. App. 342, 138 S. W. 74; *Id.*, 163 Mo. App. 123, 145 S. W. 857; *Harbison v. Beets*, 84 Kan. 11, 113 Pac. 423; *Miller v. Livingston*, 31 Utah, 415, 88 Pac. 338; *Linney v. Peloquin*, 35 Tex. 29; *Risse v. Gasch*, 43 Neb. 287, 61 N. W. 616; *Cockrill v. Cox*, 65 Tex. 669; *Wendling v. Bowen*, 252 Mo. 647, 161 S. W. 774; *Abel v. Hitt*, 30 Nev. 93, 93 Pac. 227.

Action of trial court in granting a new trial will not be reviewed where evidence was conflicting. *Smith's Estate*, 98 Cal. 636, 33 Pac. 744; *In re Weber*, 15 Cal. App. 224, 114 Pac. 597; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470.

⁵¹ *Roberts v. Bartlett*, 190 Mo. 695, 89 S. W. 858; *Sayre v. Trustees*, 192 Mo. 120, 90 S. W. 787; *Archambault v. Blanchard*, 198 Mo.

§ 91. Contest—Administrator pendente lite

During the contest upon the will, the executor is not permitted to manage the estate. It is committed to an administrator pendente lite whose power lasts until the contest is finally determined in the appellate court.⁵² This power to appoint a temporary administrator existed in the ecclesiastical court, but has been much broadened by American statutes, as our provisions regarding will contests have been broadened. Notwithstanding this power of the ecclesiastical court, chancery possessed the power, which on rare occasions it exercised, to appoint a receiver at the instance of creditors, to preserve the estate when there had been unreasonable delay in applying for probate or there was a protracted contest in the ecclesiastical court.⁵³ But chancery would not interfere when the ecclesiastical court had acted.⁵⁴ The federal courts, by vir-

426, 95 S. W. 834; *Story v. Story*, 188 Mo. 127, 86 S. W. 225; *Hughes v. Rader*, 183 Mo. 707, 82 S. W. 32; *In re Mullin*, 110 Cal. 252, 42 Pac. 645; *Estate of Carithers*, 156 Cal. 422, 105 Pac. 127; *Estate of Benton*, 131 Cal. 472, 63 Pac. 775; *In re Kaufman*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179.

⁵² *Rogers v. Dively*, 51 Mo. 193; *Lamb v. Helm*, 56 Mo. 420; *In re Estate of Soulard*, 141 Mo. 642, 43 S. W. 617; *State ex rel. v. Guinotte*, 156 Mo. 513, 57 S. W. 281, 50 L. R. A. 787; *Carroll v. Reid*, 158 Mo. 319, 59 S. W. 69; *Jordan v. Thompson*, 67 Ala. 469; *Steen v. Springfield*, 91 Ark. 73, 120 S. W. 408; *State ex rel. v. Imel*, 243 Mo. 174, 147 S. W. 992.

Pending contest of will by an heir the executors were allowed to sell timber off the land. *Burris v. Jackson*, 8 Del. Ch. 345.

⁵³ *Atkinson v. Henshaw*, 2 Ves. & Bea. 96.

⁵⁴ *Veret v. Duprey*, L. R. 6 Eq. 329.

tue of their broad equity powers, claim the same jurisdiction.⁵⁵

⁵⁵ While proceedings for the probate of a will or the establishment of intestacy of decedent's estate are in abeyance or in dispute the federal circuit court has jurisdiction, at the instance of a noncitizen creditor, to appoint receivers to preserve the estate. *Underground Electric Rys. v. Owsley* (C. C. N. Y.) 169 Fed. 671; *Id.* (N. Y.) 176 Fed. 26, 99 C. C. A. 500.

CHAPTER VII

MISTAKE, FRAUD AND UNDUE INFLUENCE

- § 92. Mistake.
- 93. Fraud.
- 94. Undue influence—General theory.
- 95. Undue influence—Distinguished from the influence of affection.
- 96. Inequalities between heirs, or injustice.
- 97. Undue influence—In connection with physical or mental weakness.
- 98. Undue influence—Confidential relations.
- 99. Undue influence—Wife or husband.
- 100. Undue influence—Evidence.
- 101. Undue influence—Inadmissible evidence.
- 102. Undue influence—Declarations of testator and devisees.

§ 92. Mistake

The affirmative grounds of contest of a will are similar to the affirmative defenses to a contract, namely, mistake, fraud and undue influence. They are based upon a like reason, that, assuming an instrument valid upon its face, there may be facts showing that the mind of the testator did not accompany the act.

Mistake, in its effect upon wills, must be confined within very narrow limits. It may be divided into Mistake of Intention and Mistake of Expression. The former may vitiate a will otherwise formal, by showing that it was not executed *animo testandi*; as where the wrong instrument is executed by mistake. Or, the mistake may affect only a portion of the will, and

probate granted with that portion omitted; as where, by mistake of the draftsman, a general revoking clause was inserted in an instrument intended to be a codicil. The only mistakes that can properly be considered in probate proceedings are those which show that the instrument, or some portion of it is not the will of the testator; i. e., was not executed by him as such. All other mistakes must be mistakes of expression and more properly arise under the head of Construction of Wills. It seems that the English ecclesiastical courts formerly exercised rather broad powers in correcting alleged mistakes in a will at the time of probate; as by supplying omissions, changing names, striking out inconsistent matter, etc. As the statute requires wills to be in writing and executed with certain formalities, the dangerous tendency of a rule which permits the probate tribunal to alter the writing to suit the supposed intentions of the testator, and then probate it as altered,—in other words, to probate his supposed intentions instead of his written instrument—was well pointed out by Lord Penzance.¹ In this country the loose rules of the old ecclesiastical courts do not prevail. It is said that a will cannot be opposed for probate by evidence of a mistake in the language of the will.² But it has recently been decided

¹ *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109-113.

² *Estate of Callaghan*, 119 Cal. 571-575, 51 Pac. 860, 39 L. R. A. 689.

The fact that a testator was grossly mistaken as to the extent of his estate does not establish a want of testamentary capacity, the true test in this regard being whether he is capable of compre-

in a will contest that evidence—even declarations of the testator—may be received to show that the will as written did not correspond with the instructions given to the scrivener. This was not, of course, for the purpose of reforming the will, but to set it aside entirely; and the case was further complicated by the fact that the testator was a feeble, illiterate old man and there were charges of undue influence.³ The general rule, however, is that a mistake of the scrivener cannot be shown for the purpose of making the will different from the language written.⁴ No bill in equity lies to reform a will.⁵

The mistake which will avail to set aside a will is a mistake as to what it contains, or as to the paper itself, not a mistake either of law or fact in the mind of the testator as to the effect of what he actually and intentionally did.⁶

hending the quantity of his property and its value. *Holmes v. Campbell College*, 87 Kan. 597, 125 Pac. 25, 41 L. R. A. (N. S.) 1126, Ann. Cas. 1914A, 475.

Under Georgia code will may be declared inoperative as to heir on ground that it was executed under a mistake of fact as to his existence or conduct. *Mallery v. Young*, 98 Ga. 728, 25 S. E. 918; *Jones v. Habersham*, 63 Ga. 146-155; *Hixon v. West*, 83 Ga. 786, 10 S. E. 450; *Pergason v. Etcherson*, 91 Ga. 785-789, 18 S. E. 29; *Young v. Mallory*, 110 Ga. 10, 35 S. E. 278; *Griffin v. Henderson*, 117 Ga. 382, 43 S. E. 712; *Franklin v. Belt*, 130 Ga. 37, 60 S. E. 146; *Sims v. Sims*, 131 Ga. 262, 62 S. E. 192.

³ *Cowan v. Shaver*, 197 Mo. 211, 95 S. W. 200; *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289.

⁴ *Chappel v. Avery*, 6 Conn. 34; *Avery v. Chappel*, 6 Conn. 270-275, 16 Am. Dec. 53; *Dunham v. Averill*, 45 Conn. 61-80, 29 Am. Rep. 642; *Comstock v. Hadlyme*, 8 Conn. 254-266, 20 Am. Dec. 100; *Hearn v. Ross*, 4 Har. (Del.) 46.

⁵ *Patch v. White*, 117 U. S. 219, 6 Sup. Ct. 617, 710, 29 L. Ed. 860.

⁶ *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346; *Bradford v. Blossom*, 207 Mo. 177-226, 105 S. W. 289.

§ 93. Fraud

Fraud in procuring a will, like fraud in procuring a contract, is an affirmative defense the burden of proving which is on the party alleging it.⁷ It is now well settled that equity will not entertain a bill to set aside a will for fraud, this being a defense which can and should be made at the probate of the will.⁸ It is not possible to define all the forms that fraud may assume, and the courts will be liberal in allowing proof of any particular form of fraud that is alleged. In some cases the fraud is claimed to consist in the assumption of a false character by one for the purpose of inducing a bequest in his favor by another; as where one is given a legacy as "husband," "wife," "child," "nephew," etc., of the testator, when in fact the testator has been imposed upon and the legatee does not bear the character by which he is described.⁹ The mere fact of the legatee having assumed a false character is not conclusive against the legacy, as the gift may have been induced as much by the personal affec-

⁷ *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604; *Dunlap v. Robinson*, 28 Ala. 100.

⁸ *Melnish v. Milton*, 3 Ch. D. 27; *Lyne v. Guardian*, 1 Mo. 410, 13 Am. Dec. 509; *Trotters v. Winchester*, 1 Mo. 413; *Swain v. Gilbert*, 3 Mo. 347; *Hans v. Holler*, 165 Mo. 47, 65 S. W. 308.

In the case of *Gains v. Chew*, 2 How. 645, 11 L. Ed. 402, the court says: "In cases of fraud, equity has a concurrent jurisdiction with a court of law, but in regard to a will charged to have been obtained through fraud, this rule does not hold. It may be difficult to assign any satisfactory reason for this exception. That exclusive jurisdiction over the probate of wills is vested in another tribunal is the only one that can be given."

⁹ *Smith v. Du Bose*, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260.

tion which the testator bore him as by the character which he was supposed to bear.¹⁰ Another form of fraud is said to consist of false statements or other impositions on the testator by which he is made to believe that a certain person, who might otherwise expect some legacy from him, has wronged him, or is unworthy of his bounty.¹¹ But false representations honestly made and with good motive are not fraudulent.¹² The fraud may apply to particular legacies only or to the whole will.¹³ Allegations of fraud

¹⁰ *Moore v. Heineke*, 119 Ala. 627, 24 South. 374.

¹¹ *Schierbaum v. Schemme*, 157 Mo. 22, 57 S. W. 526, 80 Am. St. Rep. 604; *Boyse v. Rossborough*, 6 Hof. Land Cas. 2; *Meier v. Buchter*, 197 Mo. 68, 94 S. W. 883, 6 L. R. A. (N. S.) 202, 7 Ann. Cas. 887; *In re Ruffino*, 116 Cal. 317, 48 Pac. 127.

Unreasonable prejudice or erroneous convictions toward one who is natural object of testator's bounty is no evidence of fraud or coercion. A will must be procured wholly by lying or false representations made by a beneficiary with the intention of procuring the execution of the will, in order to invalidate it for such fraud. *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441.

In Missouri, where a woman was induced to make her will in a certain way by the promise of her husband that he would provide for her daughter, when the husband was, at the time, insolvent, and knew that his promise was a false one, the will was set aside on the ground of fraud. *Gordon v. Burris*, 153 Mo. 223, 54 S. W. 546; *Id.*, 141 Mo. 602, 43 S. W. 643.

The fact that the circumstances relied on to avoid a will for fraud would be equally available to create a trust in favor of the contestants under the will does not deprive them of the right to elect which of these remedies they may prefer. *Morrison v. Thoman*, 99 Tex. 248, 89 S. W. 409.

¹² *Estate of Benton*, 131 Cal. 472, 63 Pac. 775; *Hannah v. Anderson*, 125 Ga. 407, 54 S. E. 131.

¹³ *Florey's Ex'rs v. Florey*, 24 Ala. 241.

should be specific,¹⁴ and the petition should allege that the testator was influenced by the alleged fraudulent representations.¹⁵

§ 94. Undue influence—General theory

Far the greater number of contests of wills are upon the ground of undue influence; either alone or in conjunction with fraud, confidential relations, or mental weakness. Undue influence is a doctrine of equity and may be proven for the purpose of setting aside a contract or a deed, but it is in the law of wills that it finds its fullest scope and development. *It is a refined and subtle species of fraud, savoring sometimes of deceit, sometimes of coercion, but not necessarily including either, whereby the mind and will of the testator are supplanted by that of another for some sinister purpose connected with the disposition of his property.* In such a case the instrument speaks, not the will of the testator, but that of the person exerting the undue influence. An attack upon a will on the ground that it was procured by undue influence almost necessarily assumes the existence of a will otherwise valid and regularly executed. Upon this issue,

¹⁴ Moore v. Heineke, 119 Ala. 627, 24 South. 374; Coghill v. Kennedy, 119 Ala. 641, 24 South. 459.

¹⁵ Moore v. Heineke, 119 Ala. 627, 24 South. 374; Simpler v. Lord, 28 Ga. 52.

Not fraud. Byrne v. Byrne, 250 Mo. 632, 157 S. W. 609; Benton's Estate, 131 Cal. 472, 63 Pac. 775; Estate of Purcell, 164 Cal. 300, 128 Pac. 932; Simon v. Middleton, 51 Tex. Civ. App. 531, 112 S. W. 441.

therefore, the burden of proof is on the contestants,¹⁶ and if the charges of undue influence are not sustained it is the duty of the court to direct a verdict or enter a judgment establishing the will.

The most generally accepted definition of undue influence is that given by Judge Philips:

The influence denounced by our law must be such as amounts to overpersuasion, coercion or force, destroying the free agency and will power of the testator. It must not be merely the influence of affection or attachment, or the desire of gratifying the wishes of one beloved, respected and trusted by the testator.¹⁷

¹⁶ *Patten v. Cilley* (C. C.) 46 Fed. 892; *Rockwell's Appeal*, 54 Conn. 119, 6 Atl. 198; *Motz's Estate*, 136 Cal. 558, 69 Pac. 294; *Miller v. Carr*, 94 Ark. 176, 126 S. W. 1068; *Estate of McDevitt*, 95 Cal. 177, 30 Pac. 101; *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470; *Taylor v. Wilburn*, 20 Mo. 309, 64 Am. Dec. 186; *Jones v. Roberts*, 37 Mo. App. 174; *Carl v. Gabel*, 120 Mo. 283, 25 S. W. 214; *Morton v. Heidorn*, 135 Mo. 608, 37 S. W. 504; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127; *Gordon v. Burris*, 141 Mo. 613, 43 S. W. 642; *Campbell v. Carlisle*, 162 Mo. 634, 63 S. W. 701; *Crowson v. Crowson*, 172 Mo. 702, 72 S. W. 1065; *Boyse v. Rosborough*, 6 Hof. Land Cas. 2; *Rich v. Bowker*, 25 Kan. 7; *Cullum v. Colwell*, 85 Conn. 459, 83 Atl. 695; *Weber v. Strobel*, 236 Mo. 649, 139 S. W. 188; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98; *Boggs v. Boggs*, 62 Neb. 274, 87 N. W. 39; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650.

¹⁷ *Jackson v. Hardin*, 83 Mo. 175; *Lorts v. Wash*, 175 Mo. 502, 75 S. W. 95; *Riley v. Sherwood*, 144 Mo. 366, 45 S. W. 1077; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Id.*, 120 Mo. 275, 25 S. W. 506; *Sehr v. Lindemann*, 153 Mo. 289, 54 S. W. 537; *Tibbe v. Kamp*, 154 Mo. 579, 54 S. W. 879, 55 S. W. 440; *Martin v. Bowdern*, 158 Mo. 392, 59 S. W. 227; *Gordon v. Burris*, 153 Mo. 237, 54 S. W. 546; *Jones v. Roberts*, 37 Mo. App. 180; *Judge Burgess on Crowson v.*

Undue influence and fraud are not identical. The one has reference to the subjugation of the will of the testator and controlling it. The other to a deception practiced upon the testator. While in a sense undue influence is a species of fraud, it may be exercised without any actual fraud, or false representation being made to the testator.¹⁸

Crowson, 172 Mo. 702, 72 S. W. 1065; Elliott v. Welby, 13 Mo. App. 19; Field v. Camp (C. C.) 193 Fed. 160; Sheppey v. Stevens (C. C.) 185 Fed. 147; Bowdoin College v. Merritt (C. C.) 75 Fed. 480; Ormsby v. Webb, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 805; Harding v. Handy, 11 Wheat. 103, 6 L. Ed. 429; Parker v. Hill, 85 Ark. 363, 108 S. W. 208; Smith v. Boswell, 93 Ark. 66, 124 S. W. 261; Leverett v. Carlisle, 19 Ala. 80; Pool v. Pool, 35 Ala. 17; Dunlap v. Robinson, 28 Ala. 100; Kramer v. Weinert, 81 Ala. 414, 1 South. 26; Bulger v. Ross, 98 Ala. 267, 12 South. 803; Higginbotham v. Higginbotham, 106 Ala. 314, 17 South. 516; Goodwin v. Goodwin, 59 Cal. 561; In re Kaufman, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; Estate of Motz, 136 Cal. 558, 69 Pac. 294; Latour's Estate, 140 Cal. 414, 73 Pac. 1070; Estate of Higgins, 156 Cal. 257, 104 Pac. 6; Estate of Ricks, 160 Cal. 450-467, 117 Pac. 532; Estate of Kilborn, 162 Cal. 4, 120 Pac. 762; Estate of Morcel, 162 Cal. 188, 121 Pac. 733; Blackman v. Edsall, 17 Colo. App. 429, 68 Pac. 790; Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306; Winn v. Grier, 217 Mo. 420, 117 S. W. 48; Gibony v. Foster, 230 Mo. 106, 130 S. W. 314; Turner v. Anderson, 236 Mo. 523, 139 S. W. 180; Hayes v. Hayes, 242 Mo. 155, 145 S. W. 1155; Berst v. Moxom, 157 Mo. App. 342, 138 S. W. 74; Id., 163 Mo. App. 123, 145 S. W. 857; Luebbert v. Brockmeyer, 158 Mo. App. 196, 138 S. W. 92; In re Weber, 15 Cal. App. 224, 114 Pac. 597; Estate of Packer, 164 Cal. 525, 129 Pac. 778; Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39; In re Jackman, 26 Wis. 104; Simon v. Middleton, 51 Tex. Civ. App. 531, 112 S. W. 441;

¹⁸ Estate of Ricks, 160 Cal. 467, 117 Pac. 539; Estate of Morcel, 162 Cal. 188, 121 Pac. 733; Moore v. Heineke, 119 Ala. 638, 24 South. 374; Terry v. Buffington, 11 Ga. 337, 56 Am. Dec. 423; Stewart v. Elliott, 13 D. C. 307; Franklin v. Belt, 130 Ga. 37, 60 S. E. 146; Estate of Olson, 19 Cal. App. 379, 126 Pac. 171.

Undue influence may be the influence of fear, or the desire for peace,¹⁹ it may be the influence of flattery or overpersuasion;²⁰ it may be the pressure of a vigorous mind upon a weaker one, especially one habituated to obey the leadership of the other; it may be a moral coercion from the circumstances or relation of the parties, which the testator finds it impossible to resist; or it may be the nagging importunities of those surrounding a feeble and helpless testator upon whose ministrations the peace and comfort of his dying hours de-

Latham v. Schaal, 25 Neb. 535, 41 N. W. 354; McIntosh v. Moore, 22 Tex. Civ. App. 22, 53 S. W. 611; Wetz v. Schneider, 34 Tex. Civ. App. 201, 78 S. W. 394; Millican v. Millican, 24 Tex. 427; Patterson v. Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Miller v. Livingston, 36 Utah, 228, 102 Pac. 996; Id., 31 Utah, 415, 88 Pac. 338; Stull v. Stull, 1 Neb. (Unof.) 389, 96 N. W. 196; Alford v. Johnson, 103 Ark. 236, 146 S. W. 516; Estate of Olson, 19 Cal. App. 379, 126 Pac. 171.

Undue influence defined. Conley v. Nailor, 118 U. S. 127, 6 Sup. Ct. 1001, 30 L. Ed. 112; Peery v. Peery, 94 Tenn. 328, 29 S. W. 1; Westcott v. Sheppard, 51 N. J. Eq. 315, 30 Atl. 428; Schmidt v. Schmidt, 47 Minn. 451-457, 50 N. W. 598; Earl of Sefton v. Hopwood, 1 Post. & Fin. 578; Hall v. Hall, 1 Prob. & Div. 481; Parfitt v. Lawless, 2 Prob. & Div. 462; Wingrove v. Wingrove, 11 Prob. & Div. 81; Ginter v. Ginter, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; Ball v. Kane, 1 Pennewill (Del.) 90, 39 Atl. 778; Pritchard v. Henderson, 3 Pennewill (Del.) 120, 50 Atl. 217; Chandler v. Ferris, 1 Har. (Del.) 454; Steele v. Helm, 2 Marv. (Del.) 237, 43 Atl. 153; Cordrey v. Cordrey, 1 Houst. (Del.) 269; Ethridge v. Bennett, 9 Houst. (Del.) 295, 31 Atl. 813; Barbour v. Moore, 4 App. D. C. 535; Towson v. Moore, 11 App. D. C. 377; Potts v. House, 6 Ga. 324, 50 Am. Dec. 329; Walker v. Hunter, 17 Ga. 364; Thompson v. Davitte, 59 Ga. 472.

¹⁹ Gay v. Gillilan, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712; Ketchum v. Stearns, 8 Mo. App. 70; Black's Estate, Myr. Prob. (Cal.) 24; McDaniel v. Crosby, 19 Ark. 533; Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39.

²⁰ Denslow v. Moore, 2 Day (Conn.) 12.

pend. In all these cases where the influence is acquired and deliberately exerted to rob the testator of his freedom of choice, the law condemns it as undue, and will not permit those who have sought to benefit by such conduct to secure the fruits of their wrong. It is certain, however, that the influence must not only exist, but it must have been actually exerted and must have had its effect on the will.²¹ The existence of in-

²¹ *Crowson v. Crowson*, 172 Mo. 703, 72 S. W. 1065; *Sunderland v. Hood*, 13 Mo. App. 232, affirmed 84 Mo. 293; *Brinkman v. Ruegesick*, 71 Mo. 553; *Miller v. Carr*, 94 Ark. 176, 126 S. W. 1068; *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *Estate of McDevitt*, 95 Cal. 17, 30 Pac. 101; *Kaufman's Estate*, 117 Cal. 295, 49 Pac. 192, 59 Am. St. Rep. 179; *Black's Estate*, 132 Cal. 392, 64 Pac. 695; *Keegan's Estate*, 139 Cal. 123, 72 Pac. 828; *In re Shell*, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181; *Gibony v. Foster*, 230 Mo. 106, 130 S. W. 314; *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932.

Need not be exercised by beneficiary of will. *Cahill's Estate*, 74 Cal. 54, 15 Pac. 364.

It must be brought to bear directly upon the testamentary act, and particular parties must be benefited or disfavored as the result of the purpose and pressure of the dominating mind. *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; *Farr v. Thompson*, Cheves (S. C.) 37-49; *Perkins v. Perkins*, 116 Iowa, 253-262, 90 N. W. 55.

Undue influence must exist at time will was made. *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872.

A contract between two prospective heirs, the direct tendency of which is to encourage the exercise of undue influence over the testator is void as against public policy. *Sheppey v. Stevens* (C. C.) 185 Fed. 147.

Subsequent ratification after undue influence is removed may validate will. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

If a will be invalid when executed by reason of undue influence, a subsequent parol assent to its provisions would not validate it. *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233.

terest or opportunity to exert undue influence raises no presumption that it was exerted.²²

§ 95. Undue influence—Distinguished from the influence of affection

Not every influence, however strong, can be branded as undue and be sufficient to set aside a will deliberately and regularly executed.²³ As has been well said we are all surrounded by influences of some sort all the time, and every testator is controlled by some influence in the disposition of his property, especially where he discriminates between persons who are equally within the range of his bounty.

²² Dale's Appeal, 57 Conn. 143, 17 Atl. 757; Langford's Estate, 108 Cal. 608, 41 Pac. 701; Nelson's Estate, 132 Cal. 182, 64 Pac. 294; Black's Estate, 132 Cal. 392, 64 Pac. 695; Estate of Dolbeer, 153 Cal. 652, 96 Pac. 266, 15 Ann. Cas. 207; Luebbert v. Brockmeyer, 158 Mo. App. 196, 138 S. W. 92; Cudney v. Cudney, 68 N. Y. 148; Ginter v. Ginter, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; Dean v. Negley, 41 Pa. 312-316, 80 Am. Dec. 620.

It is not necessary that the overt acts of undue influence should have been exercised at the exact time of the execution of the will, but it is sufficient to show that such influence over the mind of the testator had been acquired previously and did operate at the time the will was made. Mowry v. Norman, 204 Mo. 173, 103 S. W. 15.

²³ Newton v. Carbery, 5 Cranch, C. C. (D. C.) 626, Fed. Cas. No. 10,189.

Where a will is contested on the ground of undue influence, and it appears that the will was made by a man in the prime of life, and in the full possession of his mental power, who gave instructions for his will to a lawyer, and executed it in accordance with the forms of law without the presence of any relative, the evidence is insufficient to justify a verdict against the will. In re Carriger, 104 Cal. 81, 37 Pac. 785; Burge v. Hamilton, 72 Ga. 568.

But undue influence may exist without mental or physical weakness. Estate of Olson, 19 Cal. App. 379, 126 Pac. 171.

Affection or a desire to gratify another's wishes is not that sort of coercion that amounts to undue influence.²⁴ Nor is mere advice, argument or persuasion which does not deprive the testator of his free agency.²⁵

The rule that any degree of influence over another acquired by kindness and attention can never constitute undue influence within the meaning of the law concerning wills applies alike to wills whose execution is procured by the influence of a friend, as well as those whose execution is procured by the influence of a wife, child, or other kinsman.²⁶

²⁴ Taylor v. Kelly, 31 Ala. 59, 68 Am. Dec. 150; Leeper v. Taylor, 47 Ala. 221; Moore v. Spier, 80 Ala. 129; Bancroft v. Otis, 91 Ala. 279, 8 South. 286, 21 Am. St. Rep. 904; Bulger v. Ross, 98 Ala. 267, 12 South. 803; Goodwin v. Goodwin, 59 Cal. 561; Frantz v. Porter, 132 Cal. 49, 64 Pac. 92; Towson v. Moore, 11 App. D. C. 377; Means v. Means, 5 Strob. (S. C.) 167-192; Ginter v. Ginter, 79 Kan. 721-726, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; Carmen v. Kight, 85 Kan. 18, 116 Pac. 231; Seibert v. Hatcher, 205 Mo. 83, 102 S. W. 962; Weber v. Strobel, 236 Mo. 649, 139 S. W. 188; Rogers v. Diamond, 13 Ark. 474; McCulloch v. Campbell, 49 Ark. 367, 5 S. W. 590; Boggs v. Boggs, 62 Neb. 274, 87 N. W. 39; In re Jackman, 26 Wis. 104; Alford v. Johnson, 103 Ark. 236, 146 S. W. 516.

It is not proper in all cases to charge that influence acquired by kindness and affection is not undue. Miller v. Livingstone, 36 Utah, 228, 102 Pac. 996.

Bringing about a quarrel between testator and another relative is not undue influence. Estate of Morcel, 162 Cal. 188, 121 Pac. 733.

²⁵ Chandler v. Ferris, 1 Har. (Del.) 454; Duffield v. Morris Ex'r, 2 Har. (Del.) 375; Steele v. Helm, 2 Marv. (Del.) 237, 43 Atl. 153; Lodge v. Lodge's Will, 2 Houst. (Del.) 421; Berst v. Moxom, 157 Mo. App. 342, 138 S. W. 74; Id., 163 Mo. App. 123, 145 S. W. 857; Franklin v. Boone, 39 Tex. Civ. App. 597, 88 S. W. 262; Robinson v. Stuart, 73 Tex. 267, 11 S. W. 275.

²⁶ Campbell v. Carlisle, 162 Mo. 635, 63 S. W. 701; Brinkman v.

§ 96. Inequalities between heirs, or injustice

Inequalities between heirs are no ground for setting aside the will of a competent person.²⁷ An unjust or an unnatural will may be corroborative evidence of undue influence,²⁸ but it is not sufficient evidence of itself,²⁹ and does not cast upon the beneficiaries the burden of proving that no undue influence existed or was used.³⁰ It is not the duty of the court to make

Rueggiesick, 71 Mo. 556; *Carl v. Gabel*, 120 Mo. 297, 25 S. W. 214; *Norton v. Paxton*, 110 Mo. 466, 19 S. W. 807.

²⁷ *Thomas v. Stump*, 62 Mo. 275; *Farmer v. Farmer*, 129 Mo. 530-539, 31 S. W. 926; *Berberet v. Berberet*, 131 Mo. 410, 33 S. W. 61, 52 Am. St. Rep. 634; *Doherty v. Gilmore*, 136 Mo. 420, 37 S. W. 1127; *McFadin v. Catron*, 138 Mo. 197, 38 S. W. 932, 39 S. W. 771; *Id.*, 120 Mo. 272, 25 S. W. 506; *Wood v. Carpenter*, 166 Mo. 485, 66 S. W. 172; *Catholic University v. O'Brien*, 181 Mo. 93, 79 S. W. 901; *McDevitt's Estate*, 95 Cal. 17, 30 Pac. 101; *Snider v. Burks*, 84 Ala. 53, 4 South. 225; *Wilson's Estate*, 117 Cal. 277, 49 Pac. 172; *Means v. Means*, 5 Strob. (S. C.) 167-191; *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; *Singer v. Taylor*, 90 Kan. 285, 133 Pac. 841; *Winn v. Grier*, 217 Mo. 420, 117 S. W. 48; *Hayes v. Hayes*, 242 Mo. 155, 145 S. W. 1155; *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441.

Where the only evidence of duress or undue influence was that the testator was eighty-five years old and made an unequal distribution among his children the court did right in directing a verdict sustaining the will. *Manogue v. Herrell*, 13 App. D. C. 455.

²⁸ *Thomas v. Stump*, 62 Mo. 275; *Young v. Ridenbaugh*, 67 Mo. 586; *Muller v. St. Louis Hospital Ass'n*, 73 Mo. 242; *Id.*, 5 Mo. App. 397; *Gay v. Gillilan*, 92 Mo. 264, 5 S. W. 7, 1 Am. St. Rep. 712; *Meier v. Buchter*, 197 Mo. 68, 94 S. W. 883, 6 L. R. A. (N. S.) 202, 7 Ann. Cas. 887; *Tobin v. Jenkins*, 29 Ark. 151; *Langford's Estate*, 108 Cal. 608, 41 Pac. 701.

²⁹ *Aylward v. Briggs*, 145 Mo. 612, 47 S. W. 510; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604.

³⁰ *Maddox v. Maddox*, 114 Mo. 47, 21 S. W. 499, 35 Am. St. Rep. 734; *Hughes v. Rader*, 183 Mo. 710, 82 S. W. 32.

men's wills for them as in the light of all their circumstances it thinks they should be made.

A testator, having sufficient mental capacity, has the right to make an unreasonable, unjust, injudicious will, and his neighbors have no right, sitting on a jury, to alter the disposition of his property, simply because they may think the testator did not do justice to his family connection.³¹

Fraud or undue influence in procuring one legacy in a will does not invalidate other legacies not so procured.³²

³¹ *Berberet v. Berberet*, 131 Mo. 411, 33 S. W. 61, 52 Am. St. Rep. 634; *Tibbe v. Kamp*, 154 Mo. 584, 54 S. W. 879, 55 S. W. 440; *Maddox v. Maddox*, 114 Mo. 47, 21 S. W. 499, 35 Am. St. Rep. 734; *Jackson v. Hardin*, 83 Mo. 185; *Hoepner v. Bell*, 35 App. D. C. 534.

³² *Frinlestown v. Dalton*, 1 Dow. & Clark, 85; *Florey's Ex'rs v. Florey*, 24 Ala. 241; *Councill v. Mayhew*, 172 Ala. 295, 55 South. 314; *White v. Howard*, 38 Conn. 356; *Harrison's Appeal*, 48 Conn. 203; *Livingston's Appeal*, 63 Conn. 78, 26 Atl. 470; *Lyons v. Campbell*, 88 Ala. 462, 7 South. 250; *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22; *In re Welsh*, 1 Redf. Sur. 238; *In re Hess's Will*, 31 Am. St. Rep. 691; *Holmes v. Campbell College*, 87 Kan. 597-599, 125 Pac. 25, 41 L. R. A. (N. S.) 1126, Ann. Cas. 1914A, 475; *Morris v. Stokes*, 21 Ga. 552-569.

The rule in Missouri seems to be contrary to the general rule.

A will shown to be the product of undue influence of one devisee or legatee out of several is as much void as if it was the product of the undue influence of all of them. *Teckenbrock v. McLaughlin*, 209 Mo. 533-542, 108 S. W. 46.

Allegation of undue influence insufficient. *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606.

§ 97. Undue influence—In connection with physical or mental weakness

We have seen that mere age, however great, is not sufficient to destroy testamentary capacity, nor is mere physical weakness or helplessness if the mind remains clear. But physical or mental weakness, which in itself would not be sufficient to defeat a will, may tempt the covetous to acquire and exert an undue influence. For this reason the courts scrutinize very carefully a charge of undue influence under such circumstances. As said by Judge Black:

It needs no argument to show that it takes less persuasion or coercion to overcome a weak mind than it does a strong one. In determining whether the will was the result of overinfluence, it is entirely proper to consider the mental condition of the person upon whom the influence is alleged to have been exercised. And, as the physical condition has much to do with the mental, the physical condition of the testator may also be considered. So the will itself may be read to the jury, for they must determine the question of undue influence in the light of all the circumstances. The result may be considered in endeavoring to find the cause.³³

³³ *Myers v. Hauger*, 98 Mo. 438, 11 S. W. 974; *Maddox v. Maddox*, 114 Mo. 46, 21 S. W. 499, 35 Am. St. Rep. 734; *Young v. Ridenbaugh*, 67 Mo. 584; *Mooney v. Olsen*, 22 Kan. 69; *Delaney v. Salina*, 34 Kan. 532, 9 Pac. 271; *Tobin v. Jenkins*, 29 Ark. 151; *Knox v. Knox*, 95 Ala. 495, 11 South. 125, 36 Am. St. Rep. 235; *Burney v. Torrey*, 100 Ala. 157, 14 South. 685, 46 Am. St. Rep. 33; *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Schieffelin v. Schieffelin*, 127 Ala. 34, 28 South. 694; *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252; *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598; *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058; *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956; *Byrne v. Byrne*, 250 Mo. 632, 157 S. W. 609; *Borchers v. Borchers*, 143 Mo. App. 72, 122 S. W. 357; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Olmstead v. Webb*, 5 App. D. C. 38; *Smith v.*

§ 98. Undue influence—Confidential relations

It is a general doctrine of equity that where a confidential relation exists which would naturally give rise to a degree of trust and confidence on the part of one, and a power of leadership or influence on the part of the other, that the one having such influence or authority cannot obtain any pecuniary advantage in a transaction with the other without the burden of showing that the transaction was fair and not the result of the influence so presumed to exist. The confidential relations from which such a presumption usually arises are those of guardian and ward, attorney and client, principal and business agent, nurse and patient and priest and parishioner. This doctrine has been applied with special force to wills.

The rule in most states is that if the beneficiary who is charged with undue influence occupied a confidential relation to the testator and was active in procuring the will to be executed the exertion of undue influence is presumed. The presumption of the existence of influence arises from the confidential relation. We have

Smith, 75 Ga. 477; Dennis v. Weekes, 46 Ga. 514; Jackson v. Jackson, 32 Ga. 325; Mowry v. Norman, 204 Mo. 173, 103 S. W. 15; In re Young's Estate, 33 Utah, 382, 94 Pac. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596.

Want of capacity and undue influence sufficient to set aside will. Abel v. Hitt, 30 Nev. 93, 93 Pac. 227; Estate of De Laveaga, 165 Cal. 607, 133 Pac. 307.

Age and failing memory with undue influence—evidence not sufficient to set aside will. Estate of Purcell, 164 Cal. 300, 128 Pac. 932; James v. Sutton, 36 Neb. 393, 54 N. W. 670; Thompson v. Thompson, 49 Neb. 157, 68 N. W. 372.

seen, however, that the existence of influence standing alone is not sufficient to shift the burden of proof. There must be evidence of its exertion in procuring the will. This is supplied by the evidence of the active participation by the beneficiary in the making of the will. The two together therefore raise a presumption of both the existence and exertion of undue influence and cast the burden of proof upon the proponent to rebut such presumption.³⁴ That the will was written, prepared or drawn by the beneficiary is such active participation.³⁵

It is held in some states that the mere existence of a confidential relation casts the burden upon the proponents of the will to show that the influence thus presumed was not exerted in the particular will.³⁶ But

³⁴ *Jenkins v. Tobin*, 31 Ark. 306; *Hill v. Barge*, 12 Ala. 687; *Bancroft v. Otis*, 91 Ala. 279, 8 South. 286, 24 Am. St. Rep. 904; *Chandler v. Jost*, 96 Ala. 596, 11 South. 636; *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *McQueen v. Wilson*, 131 Ala. 606, 31 South. 94; *Richmond's Appeal*, 59 Conn. 247, 22 Atl. 82, 21 Am. St. Rep. 85; *Turner's Appeal*, 72 Conn. 306, 44 Atl. 310; *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; *In re Will of Martin*, 98 N. Y. 193.

³⁵ *McDaniel v. Crosby*, 19 Ark. 533; *Daniel v. Hill*, 52 Ala. 430; *McQueen v. Wilson*, 131 Ala. 606, 31 South. 94; *Garrett v. Heflin*, 98 Ala. 615, 13 South. 326, 39 Am. St. Rep. 89; *Byrne's Estate*, Myr. Prob. (Cal.) 1; *Estate of Morey*, 147 Cal. 495, 82 Pac. 57; *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735; *Livingston's Appeal*, 63 Conn. 78, 26 Atl. 470; *Miller v. Livingstone*, 31 Utah, 415, 88 Pac. 338; *Renn v. Samos*, 33 Tex. 760.

³⁶ It is a universally recognized rule of equity, which is applied also in analogous cases at law, that where a confidential relation is shown to exist between the testator and the recipient of his bounty, an exerted influence will be presumed to have induced the

the general rule does not go to that extent. The mere existence of a confidential relation is not sufficient to cast the burden upon the beneficiary,³⁷ but is an element and a very important one in making a case of actual undue influence.³⁸ The fact that the person who drew the will or caused it to be prepared was a beneficiary under it was, by the Roman law, sufficient to invalidate it. But under the common law, this is only a circumstance, although a very suspicious one, to be taken in connection with other proof of undue influence.³⁹

bequest, and the onus is cast upon the beneficiaries to make explanation of the transaction and establish its reasonableness. *Maddox v. Maddox*, 114 Mo. 46, 21 S. W. 499, 35 Am. St. Rep. 734; *Sawyer v. White*, 122 Fed. 223, 58 C. C. A. 587; *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15; *Id.*, 223 Mo. 463, 122 S. W. 724; *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289; *Byrne v. Byrne*, 250 Mo. 632, 137 S. W. 609; *Wendling v. Bowden*, 252 Mo. 647, 161 S. W. 774.

Strong dicta that inequality among heirs must be explained by such beneficiary. *Wendling v. Bowden*, 252 Mo. 647, 161 S. W. 774.

³⁷ No presumption of undue influence from mere existence of confidential relation. *Parfitt v. Lawless*, 2 Prob. Div. 462; *Tyson v. Tyson's Ex'r*, 37 Md. 567; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *In re Will of Smith*, 95 N. Y. 516-523; *Sparks' Case*, 63 N. J. Eq. 242-247, 51 Atl. 118; *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273; *Wheeler v. Whipple*, 44 N. J. Eq. 141, 14 Atl. 275; *Furlong v. Carraher*, 108 Iowa, 492, 79 N. W. 277; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 31; *Estate of Packer*, 164 Cal. 525, 129 Pac. 778; *Bancroft v. Otis*, 91 Ala. 279, 8 South. 286, 24 Am. St. Rep. 904 (overruling *Moore v. Spier*, 80 Ala. 129); *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Hutcheson v. Bibb*, 142 Ala. 586, 38 South. 754; *Estate of Ricks*, 160 Cal. 467, 117 Pac. 539; *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915.

³⁸ *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

³⁹ *Harvey v. Sullens*, 46 Mo. 147-151, 2 Am. Rep. 491; *Barr v. Buttin*, 1 Cart. Ecc. 637-651; *Beall v. Mann*, 5 Ga. 456.

It has been held that a confidential relation exists between an aged lady and her business agent,⁴⁰ attorney and client,⁴¹ physician or nurse and patient,⁴² guardian and ward,⁴³ spiritual adviser or⁴⁴ religious institution under whose care the testator was⁴⁵ and the testator.

⁴⁰ *Harvey v. Sullens*, 56 Mo. 374; *Id.*, 46 Mo. 147, 2 Am. Rep. 491; *Dausman v. Rankin*, 189 Mo. 677, 88 S. W. 696, 107 Am. St. Rep. 391; *Roberts v. Bartlett*, 190 Mo. 699, 89 S. W. 858; *Bradford v. Blossom*, 190 Mo. 119, 88 S. W. 721; *Hagerty v. Olmstead*, 39 App. D. C. 170; *Goodloe v. Goodloe*, 47 Tex. Civ. App. 493, 105 S. W. 533.

No presumption of undue influence where daughter acted as business agent of mother. The presumption is not so strong in case of natural relations as of artificial fiduciary relations, such as attorney and client, guardian and ward, etc. *Lockwood v. Lockwood*, 80 Conn. 513, 69 Atl. 8.

Intimate friendship is not a fiduciary relation. *In re Estate of Hayes*, 55 Colo. 340, 135 Pac. 449.

⁴¹ *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735.

Evidence admissible that white lawyer who drew the will was beneficiary in the wills of four other full blood Indians. *Welch v. Barnett*, 34 Okl. 166, 125 Pac. 472.

⁴² *Jones v. Roberts*, 37 Mo. App. 163; *Dingman v. Romine*, 141 Mo. 466, 42 S. W. 1087.

Legacies to nurse and physician upheld. *Seibert v. Hatcher*, 205 Mo. 83, 102 S. W. 962; *Riddle v. Gibson*, 29 App. D. C. 237.

⁴³ *Garvin v. Williams*, 44 Mo. 465, 100 Am. Dec. 314; *Id.*, 50 Mo. 206; *Bridwell v. Swank*, 84 Mo. 455.

⁴⁴ *Elliott v. Welby*, 13 Mo. App. 19; *Tibbe v. Kamp*, 154 Mo. 580, 54 S. W. 879, 55 S. W. 440; *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587; *Lehman v. Lindenmeyer*, 48 Colo. 305, 109 Pac. 956; *Russell v. Russell's Ex'r*, 3 Houst. (Del.) 103.

⁴⁵ *Muller v. St. Louis Hospital Ass'n*, 5 Mo. App. 398; *Id.*, 73 Mo. 242.

Belief in spiritualism may not be proof of insanity but may be relevant on issue of undue influence. *Fish v. Poorman*, 85 Kan. 237-242, 116 Pac. 898.

No confidential relation. *Weber v. Strobel*, 236 Mo. 649, 139 S. W. 188; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46.

The relation of business partner is not necessarily such a fiduciary relation as will raise a presumption against the will.⁴⁶ Undoubtedly, there must be a direct connection between the confidential relation and the pecuniary benefit in order to raise such presumption.⁴⁷ It is not presumed where no pecuniary benefit results to the person charged with its exercise—as in the case of a lawyer who draws a will,⁴⁸ or a friend who suggests it,⁴⁹ or one who is appointed executor or trustee without any beneficial interest,⁵⁰ or from the mere fact that distant relatives or religious or charitable institutions are made devisees to the partial exclusion of lawful heirs.⁵¹

The presumption of undue influence, where it arises is one of fact and not of law. It may be rebutted by showing that the testator acted freely and of his own volition, notwithstanding the relation. It is sometimes said that the beneficiary must show that the testator

⁴⁶ *Brooks' Estate*, Myr. Prob. (Cal.) 141; *Id.*, 54 Cal. 471; *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101; *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548.

⁴⁷ *Birdseye's Appeal*, 77 Conn. 623, 60 Atl. 111.

Confidential relation of husband of chief beneficiary raises presumption. *Henry v. Hall*, 106 Ala. 84, 17 South. 187, 54 Am. St. Rep. 22.

⁴⁸ *Barkley v. Cemetery Ass'n*, 153 Mo. 300, 54 S. W. 482.

⁴⁹ *Moore v. McNulty*, 164 Mo. 121, 64 S. W. 159.

⁵⁰ *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762; *Livingston's Appeal*, 63 Conn. 78, 26 Atl. 470; *Carter v. Dixon*, 69 Ga. 82; *Woodson v. Holmes*, 117 Ga. 19, 43 S. E. 467; *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73, 28 L. R. A. (N. S.) 270, 136 Am. St. Rep. 110, 20 Ann. Cas. 214.

⁵¹ *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587.

acted upon independent and disinterested advice.⁵² This is a very proper way to rebut the presumption, but a showing of independent advice is not necessary in all cases.⁵³

§ 99. Undue influence—Wife or husband

The law permits full play to all the natural affections of the testator in disposing of his property. It assumes that he will be influenced to a great extent by the wishes and inclinations of his wife and children, and such influence exerted in a fair and reasonable manner is not considered undue,⁵⁴ espe-

⁵² *McQueen v. Wilson*, 131 Ala. 606, 31 South. 94.

⁵³ *Estate of Wickes*, 139 Cal. 195, 72 Pac. 902; *Morey's Estate*, 147 Cal. 495, 82 Pac. 57; *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915; *Hine's Appeal*, 68 Conn. 551, 37 Atl. 384; *St. Leger's Appeal*, 34 Conn. 434, 91 Am. Dec. 735.

Failure of testator to revoke or amend his will for seven years after its execution raises some presumption in its favor on issue of undue influence. *Barbour v. Moore*, 10 App. D. C. 30.

⁵⁴ *Rankin v. Rankin*, 61 Mo. 295; *Jones v. Roberts*, 37 Mo. App. 182; *Myers v. Hauger*, 98 Mo. 439, 11 S. W. 974; *Thompson v. Ish*, 99 Mo. 182, 12 S. W. 510, 17 Am. St. Rep. 552; *Mays v. Mays*, 114 Mo. 536, 21 S. W. 921; *Cash v. Lust*, 142 Mo. 642, 44 S. W. 724, 64 Am. St. Rep. 576; *West v. West*, 144 Mo. 131, 46 S. W. 139; *Defoe v. Defoe*, 144 Mo. 458, 46 S. W. 433; *Aylward v. Briggs*, 145 Mo. 613, 47 S. W. 510; *Kischman v. Scott*, 166 Mo. 214, 65 S. W. 1031; *Wood v. Carpenter*, 166 Mo. 477, 66 S. W. 172; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Boyse v. Rossborough*, 6 H. L. Cases, 2; *Herwick v. Langford*, 108 Cal. 608, 41 Pac. 701; *Estate of Donovan*, 140 Cal. 390, 73 Pac. 1081; *Estate of Carithers*, 156 Cal. 422, 105 Pac. 127; *Small v. Small*, 1 Greenl. (4 Me.) 220, 16 Am. Dec. 253; *Fulton v. Freeland*, 219 Mo. 494, 118 S. W. 12, 131 Am. St. Rep. 576; *Turner v. Anderson*, 236 Mo. 523, 139 S. W. 180.

The influence which the wife exerted over the testator before marriage is too remote to be considered. *Ketchum v. Stearns*, 76

cially where such influence is acquired by kindness and affection. The same rule applies to the natural influence of the husband.⁵⁵

It is said by the Supreme Court of the United States:

It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it would deprive age and infirmity of the kindly ministrations of affection, or of the power of awarding those who bestow them.⁵⁶

It is possible, however, that the influence exerted by a wife may be undue, and as such sufficient to invalidate a will, when it is used for some sinister purpose; as, to defeat the testator's just intentions toward his other heirs. As said by Judge Scott:

But where a will is impeached for undue influence exercised over a weak intellect, and that too by one holding the close and constant relationship of a wife, it is not sufficient to show that the testator was not under restraint at the moment of the execution of the will. Such is the nature of the human mind, that when it has been habituated to the influence of another, it will yield to that influence and suffer it to have its effect, although the person in the habit of its exercise may not be present, or exert it at the time an act is done. So that the inquiry, in such cases, is not whether an undue influence was ex-

Mo. 396; *Flint's Estate*, 100 Cal. 391, 34 Pac. 863; *Fulton v. Free-land*, 219 Mo. 494, 118 S. W. 12, 131 Am. St. Rep. 576.

That testator married on day he executed will is no evidence of undue influence. *In re Estate of Paisley*, 91 Neb. 139, 135 N. W. 435.

⁵⁵ *Bancroft v. Otis*, 91 Ala. 279, 8 South. 286, 24 Am. St. Rep. 904; *Eastis v. Montgomery*, 93 Ala. 293, 9 South. 311; *Lyons v. Campbell*, 88 Ala. 462, 7 South. 250; *Johnson v. Armstrong*, 97 Ala. 731, 12 South. 72; *Kultz v. Jaeger*, 29 App. D. C. 300.

⁵⁶ *Mackall v. Mackall*, 135 U. S. 167, 10 Sup. Ct. 705, 34 L. Ed. 81.

erted at the time of the execution of the will, but whether an influence had been acquired, and did operate in the disposition of his property by the testator.⁵⁷

Most, if not all, of the cases in which the influence of the wife is claimed to be undue are what are known as stepmother cases; that is, where the testator makes liberal provision for a young wife, to the exclusion, total or partial, of the children of the first wife.⁵⁸ It must be admitted that the situation thus presented causes a great strain on human nature. No doubt the charge of undue influence is often proper in such a case, but the mere fact that a second wife is made beneficiary to the exclusion of children of a former wife is not conclusive.⁵⁹ As we have seen it is not the existence but the exertion of undue influence that avoids the will.

The existence of unlawful sexual relations raises no presumption of undue influence.⁶⁰ Nor is it un-

⁵⁷ *Taylor v. Wilburn*, 20 Mo. 309, 64 Am. Dec. 186; *Estate of Welch*, 6 Cal. App. 44, 91 Pac. 336; *Hacker v. Newborn*, 82 Eng. Rep. Reprint, 834; *Williams v. Gonde*, 1 Hagg. Ecc. 577; *Byrne v. Byrne*, 250 Mo. 632, 157 S. W. 609; *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *In re Young's Estate*, 33 Utah, 382, 94 Pac. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596; *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872.

Influence of husband. *Estate of Olson*, 19 Cal. App. 379, 126 Pac. 171.

The same principle applies to the influence of a child. *King v. Gilson*, 191 Mo. 327, 90 S. W. 367.

⁵⁸ *Miller v. Livingston*, 36 Utah, 228, 102 Pac. 996; *Id.*, 31 Utah, 415, 88 Pac. 338.

⁵⁹ *Donovan's Estate*, 140 Cal. 390, 73 Pac. 1081; *Tingley v. Cowgill*, 48 Mo. 296; *Mosley v. Fears*, 135 Ga. 71, 68 S. E. 804.

⁶⁰ *Sunderland v. Hood*, 13 Mo. App. 232; *Id.*, 84 Mo. 293; *Ruf-*

lawful for a man to make provision by will for illegitimate children.⁶¹

§ 100. Undue influence—Evidence

Undue influence can rarely be shown in any other way than by circumstantial evidence.⁶² It arises from the circumstances and relations of the testator, and for this reason a very wide range of testimony is admissible.⁶³ It is competent to go into the history of the testator, his mental traits, and

fino's Estate, 116 Cal. 304, 48 Pac. 127; *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733; *Stant v. Am. Sec. & Tr. Co.*, 23 App. D. C. 25; *Smith v. Du Bose*, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260; *Fulton v. Freeland*, 219 Mo. 494, 118 S. W. 12, 131 Am. St. Rep. 576.

Devise to a mistress is not alone evidence of undue influence. *Weston v. Hanson*, 212 Mo. 248, 111 S. W. 44. But may be taken into consideration on question of undue influence. *Smith v. Henline*, 174 Ill. 184, 51 N. E. 227; *McClure v. McClure*, 86 Tenn. 173, 6 S. W. 44; *Alford v. Johnson*, 103 Ark. 236, 146 S. W. 516.

⁶¹ *Dunlap v. Robinson*, 28 Ala. 100; *Smith v. Du Bose*, 78 Ga. 413, 3 S. E. 309, 6 Am. St. Rep. 260.

⁶² *Blackman v. Edsall*, 17 Colo. App. 429, 68 Pac. 790; *In re Shell*, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181; *Drake's Appeal*, 45 Conn. 17; *Saunders' Appeal*, 54 Conn. 116, 6 Atl. 193; *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15; *Naylor v. McRuer*, 248 Mo. 423, 154 S. W. 772; *Alford v. Johnson*, 103 Ark. 236, 146 S. W. 516; *Simon v. Middleton*, 51 Tex. Civ. App. 531, 112 S. W. 441; *In re Jackman*, 26 Wis. 104.

The use of the words, "being of sound mind and free from all undue influence" in the opening paragraph of the will is enough to cast suspicion on the will. *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15.

The fact that testator went to attorney's office and had will drawn and executed is not conclusive against undue influence. *In re Jackman*, 26 Wis. 104.

⁶³ *Tobin v. Jenkins*, 29 Ark. 151; *Sanger v. McDonald*, 87 Ark. 148, 112 S. W. 365; *Sutton v. Sutton*, 5 Har. (Del.) 459; *Olmstead*

characteristics; his habits,⁶⁴ views, affections, feelings and prejudices; his family, social and business relations;⁶⁵ the amount, character and extent of his property⁶⁶ and whence derived;⁶⁷ his physical condition; his previous dealings with the beneficiaries and others within the range of his bounty; the circumstances surrounding the making of the will,⁶⁸ and generally into every fact which will throw any light on the charge made.⁶⁹ Even evi-

v. Webb, 5 App. D. C. 38; *Barbour v. Moore*, 10 App. D. C. 30; *Alford v. Johnson*, 103 Ark. 236, 146 S. W. 516.

Need not be confined to the time of executing the will. *Bunyard v. McElroy*, 21 Ala. 311.

Substantial evidence of undue influence. *Wendling v. Bowden*, 252 Mo. 647, 161 S. W. 774; *Brown v. Pridgen*, 56 Tex. 124; *Trezevant v. Rains*, 85 Tex. 329, 23 S. W. 890; *Sanders v. Kirbie*, 94 Tex. 564, 63 S. W. 626; *Kabelmacher v. Kabelmacher*, 21 Tex. Civ. App. 317, 50 S. W. 1118, 51 S. W. 353.

⁶⁴ *Cunningham's Estate*, 52 Cal. 465.

⁶⁵ *Chandler v. Jost*, 96 Ala. 596, 11 South. 636; *Tibbett's Estate*, 137 Cal. 123, 69 Pac. 978; *Arnold's Estate*, 147 Cal. 583, 82 Pac. 252.

⁶⁶ *Eastis v. Montgomery*, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227; *In re Flint*, 100 Cal. 391, 34 Pac. 863; *Richmond's Appeal*, 59 Conn. 247, 22 Atl. 82, 21 Am. St. Rep. 85.

⁶⁷ *Ruffino's Estate*, 116 Cal. 304, 48 Pac. 127; *Gunn's Appeal*, 63 Conn. 254, 27 Atl. 1113.

Immaterial how testator acquired property (*dicta*). *Weston v. Hanson*, 212 Mo. 248-274, 111 S. W. 44.

⁶⁸ *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268.

⁶⁹ Unequal distribution of testator's property among his heirs is a circumstance to be considered in connection with the issue of undue influence. *Byrne v. Byrne*, 250 Mo. 632, 157 S. W. 609; *Thompson v. Davitte*, 59 Ga. 472; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Wendling v. Bowden*, 252 Mo. 647-688, 161 S. W. 774.

dence of the financial condition of the beneficiaries is admissible within reasonable bounds.⁷⁰

Undue influence is not solely a question of fact; it is a mixed question of law and fact.⁷¹ It is for the court to determine the character of the evidence that will disclose undue influence⁷² and for the jury to decide upon its weight and credibility.⁷³

⁷⁰ *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915; *Mooney v. Olsen*, 22 Kan. 69; *Thompson v. Ish*, 99 Mo. 172, 12 S. W. 510, 17 Am. St. Rep. 552; *Barbour v. Moore*, 10 App. D. C. 30; *Oxford v. Oxford*, 136 Ga. 589, 71 S. E. 883.

A statement inserted in a contested will as to advances to children and grandchildren may be rebutted on issue of undue influence. *Estate of Olson*, 19 Cal. App. 381, 126 Pac. 171.

⁷¹ *Pool's Heirs v. Pool's Ex'rs*, 35 Ala. 12.

⁷² Evidence of undue influence sufficient to go to jury. *McDaniel v. Crosby*, 19 Ark. 533; *Estes v. Bridgeforth*, 114 Ala. 221, 21 South. 512; *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459; *Silvany's Estate*, 127 Cal. 226, 59 Pac. 571; *Kendrick's Estate*, 130 Cal. 360, 62 Pac. 605; *Arnold's Estate*, 147 Cal. 583, 82 Pac. 252; *Snodgrass v. Smith*, 42 Colo. 60, 94 Pac. 312, 15 Ann. Cas. 548; *Gaither v. Gaither*, 20 Ga. 709; *Cato v. Hunt*, 112 Ga. 139, 37 S. E. 183; *Kerr v. Kerr*, 80 Kan. 83, 101 Pac. 647; *Carlson v. Lafgran*, 250 Mo. 527, 157 S. W. 555.

⁷³ *Higginbotham v. Higginbotham*, 106 Ala. 314, 17 South. 516.

Instructions on undue influence. *Malone v. Adams*, 113 Ga. 791, 39 S. E. 507, 84 Am. St. Rep. 259; *Seibert v. Hatcher*, 205 Mo. 83, 102 S. W. 962.

§ 101. Undue influence—Inadmissible evidence

But wide as is the latitude allowed there are some necessary limitations upon the introduction of evidence. It must fairly tend to prove the issues made.⁷⁴ While the existence of undue influence may be shown by circumstantial evidence, such evidence must do more than merely raise a suspicion of such influence,⁷⁵ or mere opportunity for its exercise.

When the validity of a will is contested upon the ground of undue influence in its execution, a court cannot be too care-

⁷⁴ *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890; *Maddox v. Maddox*, 114 Mo. 41, 21 S. W. 499, 35 Am. St. Rep. 734; *In re Calkins*, 112 Cal. 296, 44 Pac. 577; *In re Kaufman*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *Elliott v. Elliott*, 3 Neb. (Unof.) 832, 92 N. W. 1006; *Moore v. Boothe*, 39 Tex. Civ. App. 339, 87 S. W. 882.

What is not evidence of undue influence. *Brook's Estate*, 54 Cal. 471; *Carpenter v. Bailey*, 94 Cal. 406, 29 Pac. 1101; *Nelson's Estate*, 132 Cal. 182, 64 Pac. 294; *Motz's Estate*, 136 Cal. 558, 69 Pac. 294; *Calef's Estate*, 139 Cal. 673, 73 Pac. 539; *Carmen v. Kight*, 85 Kan. 18, 116 Pac. 231; *Kerr v. Kerr*, 85 Kan. 460, 116 Pac. 880; *Singer v. Taylor*, 90 Kan. 285, 133 Pac. 841; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Conner v. Skaggs*, 213 Mo. 334, 111 S. W. 1132; *Hayes v. Hayes*, 242 Mo. 155, 145 S. W. 1155; *Morgan v. Morgan*, 30 App. D. C. 436, 12 Ann. Cas. 1037; *Wetz v. Schneider*, 34 Tex. Civ. App. 201, 78 S. W. 394; *In re Weber*, 15 Cal. App. 224, 114 Pac. 597; *Estate of Riordan*, 13 Cal. App. 313, 109 Pac. 629; *Estate of Packer*, 164 Cal. 525, 129 Pac. 778; *Isaac v. Halderman*, 76 Neb. 823, 107 N. W. 1016; *Helsley v. Moss*, 52 Tex. Civ. App. 57, 113 S. W. 599; *Chaddick v. Haley*, 81 Tex. 617, 17 S. W. 233; *Stull v. Stull*, 1 Neb. (Unof.) 389, 96 N. W. 196.

A family quarrel is not proof of undue influence. *Stant v. Am. Sec. & Tr. Co.*, 23 App. D. C. 25.

Undue influence cannot be proved by opinion of witnesses. *Jones v. Grogan*, 98 Ga. 552, 25 S. E. 590; *Dennis v. Weekes*, 51 Ga. 24.

⁷⁵ *McDevitt's Estate*, 95 Cal. 17, 30 Pac. 101; *Nelson's Estate*,

ful in excluding from the consideration of the jury evidence that is incompetent or irrelevant to establish the charge. The very nature of the issue, as well as the lack of experience and of mental training on the part of the jurors in reference thereto renders them less able than the court to weigh the sufficiency of any evidence that may be offered upon this issue. The fact that the evidence has been permitted by the court to come before them justly authorizes them to consider that it is both relevant and competent for that purpose, and the evidence so received will, unconsciously it may be, produce an impression upon their minds which will not be effaced by subsequent instructions.⁷⁶

One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the federal courts that the will of a person found to be possessed

132 Cal. 182, 64 Pac. 294; *Keegan's Estate*, 139 Cal. 123, 72 Pac. 828; *Estate of Lavinburg*, 161 Cal. 536, 119 Pac. 915; *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762; *Estate of Morcel*, 162 Cal. 188, 121 Pac. 733. *Ginter v. Ginter*, 79 Kan. 721, 101 Pac. 634, 22 L. R. A. (N. S.) 1024; *Nelson's Will*, 39 Minn. 204-206, 39 N. W. 143; *Leach v. Burr*, 17 App. D. C. 128; *Robinson v. Duvall*, 27 App. D. C. 535; *Kultz v. Jaeger*, 29 App. D. C. 300; *Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *In re Weber*, 15 Cal. App. 224, 114 Pac. 597; *Boggs v. Boggs*, 62 Neb. 274, 87 N. W. 39; *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606; *Estate of Purcell*, 164 Cal. 300, 128 Pac. 932.

Evidence of the reputation of the principal devisee for chastity is not admissible. *Rogers v. Troost*, 51 Mo. 470; *Thomas v. Stump*, 62 Mo. 275; *In re Flint*, 100 Cal. 391, 34 Pac. 863; *Herwick v. Langford*, 108 Cal. 608, 41 Pac. 701.

⁷⁶ *In re Kaufman*, 117 Cal. 288, 297, 49 Pac. 192, 59 Am. St. Rep. 179.

of sound mind and memory is not to be set aside as evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor.⁷⁷

While the inequitable character of the will may be considered, if linked with other evidence tending to show undue influence, the court should not permit a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper.⁷⁸

§ 102. Undue influence—Declarations of testator and devisees

It is also well established that evidence of the declarations of the testator after the making of the will, concerning the causes which induced him to make it, are incompetent.⁷⁹ Such declarations, be-

⁷⁷ *Brewer v. J.*, in *Beyer v. Le Fevre*, 186 U. S. 114, 22 Sup. Ct. 765, 46 L. Ed. 1080.

⁷⁸ *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762; *In re Kaufman*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598.

⁷⁹ *Schierbaum v. Schemme*, 157 Mo. 22, 57 S. W. 526, 80 Am. St. Rep. 604; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Doherty v. Gilmore*, 136 Mo. 414, 37 S. W. 1127; *Jones v. Roberts*, 37 Mo. App. 163; *Bush v. Bush*, 87 Mo. 480; *McFadin v. Catron*, 120 Mo. 252, 25 S. W. 506; *Eastis v. Montgomery*, 95 Ala. 486, 11 South. 204, 36 Am. St. Rep. 227; *In re Calkins*, 112 Cal. 296, 44 Pac. 577; *In re Kaufman*, 117 Cal. 288, 49 Pac. 192, 59 Am. St. Rep. 179; *Gregory's Estate*, 133 Cal. 131, 65 Pac. 315; *Donovan's Estate*, 140 Cal. 390, 73 Pac. 1081; *Teckenbrock v. McLaughlin*, 209 Mo. 533, 108 S. W. 46; *Underwood v. Thurman*, 111 Ga. 325, 36 S. E. 788; *Davidson v. Davidson*, 2 Neb. (Unof.) 90, 96 N. W. 409; *Estate of Gleason*, 164 Cal. 756, 130 Pac. 872.

ing at best merely hearsay, are no proof of the *fact itself*, unless part of the *res gestæ*.⁸⁰ But on the other hand, as a man's mental condition and the state of his feelings and affections can only be shown by his natural expressions of them, the declarations of a testator may be admissible for *that* purpose. Statements made by a testator before and after the execution of the will are competent evidence as external manifestations of his mental condition and of the state of his natural affections; not as evidence of the truth of the facts stated.⁸¹ Upon the same principle evidence of the provisions of former wills

⁸⁰ The declarations of the testatrix when not part of the *res gestæ*, are not admissible to prove, nor may they be considered by the jury for the purpose of showing, the exercise of undue influence, although they are entitled to be shown and considered for the purpose of illustrating the state of mind of the testatrix when that state of mind is material. *Estate of Ricks*, 160 Cal. 450, 117 Pac. 532; *Id.*, 160 Cal. 467, 117 Pac. 539; *Estate of Brooks*, 54 Cal. 471; *Comstock v. Hadlyme*, 8 Conn. 263, 20 Am. Dec. 100; *Kultz v. Jaeger*, 29 App. D. C. 300.

Declarations of testator if part of the *res gestæ* may be admissible to show undue influence. *Coghill v. Kennedy*, 119 Ala. 641, 24 South. 459.

Letter written by testatrix evidence of undue influence. *Schieffelin v. Schieffelin*, 127 Ala. 36, 28 South. 687.

⁸¹ *Arnold's Estate*, 147 Cal. 583, 82 Pac. 252; *Estate of Snowball*, 157 Cal. 301, 107 Pac. 598; *Estate of Kilborn*, 162 Cal. 4, 120 Pac. 762; *Comstock v. Hadlyme*, 8 Conn. 254, 20 Am. Dec. 100; *Canada's Appeal*, 47 Conn. 450; *Crowson v. Crowson*, 172 Mo. 691, 72 S. W. 1065; *Thompson v. Ish*, 99 Mo. 170, 12 S. W. 510, 17 Am. St. Rep. 552; *Gordon v. Burris*, 141 Mo. 613, 43 S. W. 642; *Rash v. Purnel*, 2 Har. (Del.) 448-457; *Dennis v. Weekes*, 51 Ga. 24; *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289; *Towson v. Moore*, 11 App. D. C. 377; *Barbour v. Moore*, 4 App. D. C. 535; *Hayes v. Hayes*, 242 Mo. 155, 145 S. W. 1155; *In re Jackman*, 26 Wis. 104; *Estate of*

made by the testator, whether such wills were valid or not, is admissible to show what, if any, change has occurred in the feelings of the testator tending to prove or disprove the undue influence charged.⁸² While evidence of declarations and admissions of devisees are generally not admissible on the ground that their interests are several, and one devisee ought not to be prejudiced by the admissions of another,⁸³ yet it seems that under the issue of undue

Gleason, 164 Cal. 756, 130 Pac. 872; *Miller v. Livingstone*, 31 Utah, 415, 88 Pac. 338.

Declarations of testator are admissible on issue of undue influence, not to prove the actual fact of fraud or improper influence but to establish the influence and effect of the external acts (if any are shown) upon the mind of the testator himself. Authorities cited: *Patterson v. Lamb*, 21 Tex. Civ. App. 512, 52 S. W. 98; *Goodloe v. Goodloe*, 47 Tex. Civ. App. 493, 105 S. W. 533; *Stubbs v. Marshall*, 54 Tex. Civ. App. 526, 117 S. W. 1030.

Declarations and acts of the testator after the execution of the will are admissible for the purpose of showing that he did not understand that he had executed it. *Canada's Appeal*, 47 Conn. 450.

⁸² *Bulger v. Ross*, 98 Ala. 267, 12 South. 803; *Estate of Arnold*, 147 Cal. 583, 82 Pac. 252; *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058; *Crandall's Appeal*, 63 Conn. 365, 28 Atl. 531, 38 Am. St. Rep. 375; *Thompson v. Ish*, 99 Mo. 171, 12 S. W. 510, 17 Am. St. Rep. 552; *Muller v. St. Louis Hospital Ass'n*, 5 Mo. App. 400, affirmed 73 Mo. 242; *Wood v. Carpenter*, 166 Mo. 479, 66 S. W. 172; *Norton v. Paxton*, 110 Mo. 466, 19 S. W. 807; *McFadin v. Catron*, 120 Mo. 271, 25 S. W. 506; *In re Estate of Hayes*, 55 Colo. 340, 135 Pac. 449.

Former wills admissible. A testator not only has the legal right to make a will, but he may make as many wills as he chooses, and the mere fact that a change is made in a later will is not of itself evidence that testator was unduly influenced in making such change. *In re Young's Estate*, 33 Utah, 382, 94 Pac. 731, 17 L. R. A. (N. S.) 108, 126 Am. St. Rep. 843, 14 Ann. Cas. 596.

⁸³ *Ormsby v. Webb*, 134 U. S. 47, 10 Sup. Ct. 478, 33 L. Ed. 813;

influence, the declarations and admissions of those devisees who are *charged* with the undue influence are admissible.⁸⁴

Dale's Appeal, 57 Conn. 127, 17 Atl. 757; Livingston's Appeal, 63 Conn. 68, 26 Atl. 470; Stull v. Stull, 1 Neb. (Unof.) 389, 96 N. W. 196.

⁸⁴ Gordon v. Burris, 141 Mo. 612, 43 S. W. 642; Estate of Arnold, 147 Cal. 583, 82 Pac. 252; Estate of Snowball, 157 Cal. 301, 107 Pac. 598; Estate of Ricks, 160 Cal. 467, 117 Pac. 539; Morris v. Stokes, 21 Ga. 552; Jackson v. Jackson, 32 Ga. 325; Dennis v. Weekes, 51 Ga. 24; Miller v. Livingstone, 31 Utah, 415, 88 Pac. 338.

Admissions by a legatee that the will was procured by fraud or undue influence will estop his representatives after his death from claiming any benefit under the will. Whether the rights of other legatees will be affected by such admissions depends upon the proof respecting their complicity or non-complicity in the alleged fraud or undue influence. Renn v. Samos, 33 Tex. 760.

On issue of undue influence widow of deceased is not competent witness. Berst v. Moxom, 157 Mo. App. 342, 138 S. W. 74; Id., 163 Mo. App. 123, 145 S. W. 857.

CHAPTER VIII

CONSTRUCTION OF WILLS

- § 103. By the probate court.
- 104. By the executor as umpire.
- 105. By courts of equity—Based on the broad powers over trusts.
- 106. At the instance of testamentary trustees and executors.
- 107. At the instance of heirs, devisees and others.
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§ 103. By the probate court

We have seen that the question of probate presents one single clear-cut issue—whether the writing produced be the will of the testator. That issue must not be confused with others, it being well settled that the construction of the will or the enforcement of its provisions cannot be accomplished either in the formal probate in the probate court or in the

solemn proceeding in the circuit court.¹ It may be interesting to inquire then how the question is apt to arise—that is, how a will *may* be brought into court for construction.

In the first place, the probate court, after it has admitted the will to probate, has the first opportunity to construe it, and determine what it means. While it cannot do this in the probate proceedings, yet when the executor has qualified and is carrying out the terms of the will it becomes the duty of the court to decide in the first instance what it means, and what distributions of the estate it provides for, in order to supervise the acts of the executor and pass upon the correctness of his accounts.² This power of the probate court was questioned but was sustained.³ Courts of probate in ordering distribu-

¹ *Winston v. Elliott*, 169 Ala. 416, 53 South. 750; *Cox v. Cox*, 101 Mo. 168, 13 S. W. 1055; *Lilly v. Tobbein*, 103 Mo. 477, 15 S. W. 618, 23 Am. St. Rep. 887; *Owens v. Sinklear*, 110 Mo. 54, 19 S. W. 813.

When probate is granted, and not before, the authority to determine what passes under the will is devolved upon courts of law and equity. *Emmons v. Garnett*, 18 D. C. 52.

In an action which calls only for the construction of the will for the benefit and direction of the executors, the court does not have power to revoke the probate of the instrument. *Higgins v. Vanderveer*, 85 Neb. 89-96, 122 N. W. 843.

² *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387; *Andersen v. Andersen*, 69 Neb. 565, 96 N. W. 276; *Appeal of Schaeffner*, 41 Wis. 260; *Brook v. Chappell*, 34 Wis. 419; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700, 5 Ann. Cas. 191; *In re Estate of Buerstetta*, 83 Neb. 287, 119 N. W. 469; *Lesiur v. Sipherd*, 84 Neb. 296, 121 N. W. 104.

³ *Brown v. Stark*, 47 Mo. App. 370; *Allison v. Chaney*, 63 Mo. 279; *Dyer v. Carr*, 18 Mo. 246; *Overton v. Davy*, 20 Mo. 273; *Rose v. McHose*, 26 Mo. 590; *Bryant v. Christian*, 58 Mo. 100; *McIntire v. McIntire*, 14 App. D. C. 337.

tion under the will must necessarily construe it and determine in the first instance what the gifts are, to whom they should be distributed and which are void and which valid.⁴ If the will attempts to create a trust, the probate court, while having no power to administer a trust, has jurisdiction to determine how far the attempt was successful, what the trust was, the subject matter, who are the trustees and beneficiaries and distribute accordingly.⁵ From the decisions of the probate court ordering or refusing to order a particular distribution of the estate an appeal usually lies to the court of general jurisdiction which does not feel bound by the construction placed upon the will by the probate court.⁶

§ 104. By the executor as umpire

A testator may in his will designate his executor an umpire and invest him with power to construe the will and determine every doubtful question that may arise touching the testator's intentions; and if such umpire exercises the power honestly and in good faith, his decisions will not be revised by a court, notwithstanding the court may think the

⁴ Chamberlain's Appeal, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204; Mack's Appeal, 71 Conn. 122, 41 Atl. 242; Higgins v. Vandever, 85 Neb. 89, 122 N. W. 843.

⁵ Crook's Estate, Myr. Prob. (Cal.) 247.

⁶ Eliot's Appeal, 74 Conn. 586, 51 Atl. 558; Smithwick v. Kelly, 79 Tex. 564, 15 S. W. 486; Estate of Donnellan, 164 Cal. 14, 127 Pac. 166.

same erroneous. But if the umpire refuses to act, transcends his authority, makes an incomplete award, or commits some gross mistake or error of judgment evincing partiality, corruption or prejudice or violates some statutory requirement on which the dissatisfied party had a right to rely, a court of equity may interfere and correct the error, and in proper cases, restrain further abuse of such power.⁷ The executor may and should decline to act on matters affecting his private interests.⁸

BY COURTS OF EQUITY

§ 105. Based on the broad powers over trusts

The construction of a will may come before a court of equity in a suit brought for that purpose. Probate courts have no chancery powers;⁹ hence such suit is necessarily brought in a court having general equity jurisdiction. The jurisdiction of courts of equity to entertain suits for the construction of wills is based upon the broad powers exercised by those courts over trusts and trustees. The executor, under the English practice, was regarded as a trustee. He retains much of that character, even though, under the American practice, he has

⁷ *Am. Board of Com'rs of Foreign Missions v. Ferry* (C. C.) 15 Fed. 696; *Greene v. Huntington*, 73 Conn. 106, 46 Atl. 883; *Pray v. Belt*, 1 Pet. 670-679, 7 L. Ed. 309; *Couts v. Holland*, 48 Tex. Civ. App. 476, 107 S. W. 913.

⁸ *Wait v. Huntington*, 40 Conn. 9.

⁹ *Pres. Church v. McElhinney*, 61 Mo. 540; *Purvis v. Sherrod*, 12 Tex. 140-160; *Wade v. Am. Col. Soc.*, 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324.

been placed under the control of the probate court as to all the ordinary duties of his office.

The subject of the appeal to equity for the construction of a will naturally divides itself into two branches:

First: The right of executors or testamentary trustees to come into equity.

Second: The right of devisees, heirs or others to invoke the chancery jurisdiction.

§ 106. At the instance of testamentary trustees and executors

As to testamentary trustees and executors the rule is very liberal. It is a principle of equity that trustees may always ask the advice and discretion of that court in construing the trust instrument, in determining the nature and extent of the powers conferred, and, so far as concerns the trustee's duties, the interests of the respective beneficiaries. Executors whose duties extend beyond the formal settlement of the estate are within this principle whether they are technically trustees or not.¹⁰ Thus if the will creates a trust, which is imposed either on the executor or other trustees, and the terms of the trust are uncertain, or its validity is uncertain, or the powers intended to be conferred

¹⁰ *Rosenberg v. Frank*, 58 Cal. 387; *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *Bank v. Harrison*, 68 Ga. 463; *Gaines v. Gaines*, 116 Ga. 476, 42 S. E. 763; *Crossley v. Leslie*, 130 Ga. 782, 61 S. E. 851, 14 Ann. Cas. 703; *Durham v. Harris*, 134 Ga. 134, 67 S. E. 668; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700, 5 Ann. Cas. 191.

are of doubtful import, in either of these cases the trustees named, whether they be the executors or others, have the same right as other trustees to come into a court of equity to have the trust construed. This they may do for their own protection before they take the responsibility of acting under it;¹¹ executors having funds in their hands claimed by different persons may ask the direction of a court of equity as to the disposition thereof; they are treated as trustees.¹² But where the directions of the will are plain and distribution can be made by the probate court, an appeal to equity should not be made.¹³

¹¹ *Mersman v. Mersman*, 136 Mo. 244, 37 S. W. 909; *Goldtree v. Thompson*, 83 Cal. 420, 23 Pac. 383; *Crosby v. Mason*, 32 Conn. 482; *Hughes v. Fitzgerald*, 78 Conn. 4, 60 Atl. 694; *Williamson v. Grider*, 97 Ark. 588, 135 S. W. 361; *Sellers v. Sellers*, 35 Ala. 235; *Clay v. Gurley*, 62 Ala. 14; *Randle v. Carter*, 62 Ala. 95; *Moore v. Randolph*, 70 Ala. 575; *Bragg v. Beers*, 71 Ala. 151; *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524.

¹² *Hayden v. Marmaduke*, 19 Mo. 403; *Bredell v. Collier*, 40 Mo. 287; *Spurlock v. Burnett*, 170 Mo. 372, 70 S. W. 870; *Waters v. Herboth*, 178 Mo. 166, 77 S. W. 305; *Graham v. Allison*, 24 Mo. App. 516; *Tompkins v. Troy*, 130 Ala. 555, 30 South. 512; *Carroll v. Richardson*, 87 Ala. 605, 6 South. 342; *Russell v. Eubanks*, 84 Mo. 83; *Briant v. Garrison*, 150 Mo. 659, 52 S. W. 361; *Records v. Fields*, 155 Mo. 314, 55 S. W. 1021; *Purvis v. Sherrod*, 12 Tex. 140-160; *Wade v. Am. Col. Soc.*, 7 Smedes & M. (Miss.) 663, 45 Am. Dec. 324.

¹³ "It is only in cases where a trust is involved or where the duty of an executor, administrator or other trustee is of an uncertain nature, requiring the guidance or direction of the court, that the court can be called upon merely to give its opinion as to the true construction of a will. *Corry v. Fleming*, 29 Ohio St. 149; *Kennedy v. Merrick*, 46 Neb. 260-263, 64 N. W. 960.

§ 107. At the instance of heirs, devisees and others

The right of heirs, devisees, and others to invoke the aid of equity is not so broad. In general it is necessary for the complainant to bring himself within some of the recognized heads of equity jurisdiction. He must show the existence of a trust, or an alleged trust, or some other equitable right or title before equity will construe the will at his instance. He has no such official standing before that court as the executor.¹⁴

In some states the right to appeal to the original chancery powers in the settlement of estates still exists where the probate court has not acted.¹⁵ But in most states the powers of the probate tribunal over the ordinary settlement and distribution of an estate are plenary, and the appeal to equity in matters which could be disposed of in the probate court

¹⁴ *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585; *Evins v. Cawthon*, 132 Ala. 184, 188, 31 South. 441; *Lake View M. & M. Co. v. Hannon*, 93 Ala. 88, 9 South. 539; *Brant v. Brant*, 40 Mo. 266; *Bank v. Chambers*, 96 Mo. 467, 10 S. W. 38; *First Baptist Church v. Robberson*, 71 Mo. 327; *Hamer v. Cook*, 118 Mo. 489, 24 S. W. 180; *Graham v. Allison*, 24 Mo. App. 516; *French v. Mastin*, 19 Mo. App. 614; *Lich v. Lich*, 158 Mo. App. 400, 138 S. W. 558; *St. James O. A. v. Shelby*, 75 Neb. 591, 106 S. W. 604; *Hawes v. Foote*, 64 Tex. 22; *U. S. v. Gillespie (C. C.)* 9 Fed. 74; *Fisher v. Fisher*, 80 Neb. 145, 113 N. W. 1004.

Equity has jurisdiction of suit by remainderman to declare life estate terminated, under California code. In *re De Leon*, 102 Cal. 537, 36 Pac. 864.

¹⁵ *Clarke v. Perry*, 5 Cal. 60, 63 Am. Dec. 82; *Sanford v. Head*, 5 Cal. 298.

is discouraged or denied.¹⁶ Equity will not entertain jurisdiction of a bill brought solely to construe a will which disposes of legal estates only, and which makes no attempt to create any trust relations with respect to the property devised.¹⁷

¹⁶ Act of Congress gives to probate courts exclusive original jurisdiction of all matters pertaining to settlement of estates. But district courts may take cognizance of equitable suits for construction of wills. But when will is construed it is left to the probate court to execute, and district court will not proceed with administration. *Allen v. Barnes*, 5 Utah, 100, 12 Pac. 912.

¹⁷ *Frank v. Frank*, 88 Ark. 1, 113 S. W. 640, 19 L. R. A. (N. S.) 176, 129 Am. St. Rep. 73; *Head v. Phillips*, 70 Ark. 432, 68 S. W. 878; *Jordan v. O'Brien*, 33 App. D. C. 189; *Hasler v. Williams*, 34 App. D. C. 319.

Where no trust is created neither the executor, nor the heirs or devisees, who claim only a legal title in the estate, will be permitted to come into a court of equity for the purpose of obtaining a construction of the will. Where only purely legal titles are involved equity will not assume jurisdiction to declare such legal titles, but will remit the parties to their remedy at law. *Andersen v. Andersen*, 69 Neb. 565, 96 N. W. 276; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700, 5 Ann. Cas. 191; *Kennedy v. Merrick*, 46 Neb. 260, 64 N. W. 960.

Contra: The district court has jurisdiction of a suit brought to obtain a construction of a will, irrespective of the existence of a trust, and wherein there is no prayer for any other relief. *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 929; *Thomas v. Matthews*, 51 Tex. Civ. App. 304, 112 S. W. 120.

The validity of a note held by the testator cannot be determined in a suit to construe his will. *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219.

§ 108. Proper and necessary parties

Where equity entertains a bill to construe a will, or to establish or enforce any rights under it the usual rule applies that all parties in interest or whose rights will be affected by the decree must be made parties.¹⁸ This is to the end that complete equity may be done. The court will not determine the interest of any person not made a party.¹⁹ The executor or administrator should always be made a party until the estate has been settled and the property distributed.²⁰ If the executors are also legatees they should be made parties in both their official and their individual capacities.²¹ If the action relates only to the rights of particular legatees in a particular part of the estate legatees not interested in that particular fund or property need not be joined.

In many cases the executors represent sufficiently the estate and the general and residuary legatees.²²

¹⁸ *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758. Construction of will in equity to give complete relief when jurisdiction is taken. *Galloway v. Darby*, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782.

Insufficient petition for construction of will. *Pitts v. Burdick*, 91 Neb. 123, 135 N. W. 372.

Persons having no interest cannot ask construction of will. *Foster v. Hardee*, 135 Ga. 591, 69 S. E. 1110.

¹⁹ *Barnes v. Kelly*, 71 Conn. 220, 41 Atl. 772.

²⁰ *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320.

²¹ *Cunningham v. Cunningham*, 72 Conn. 254, 43 Atl. 1046.

²² *Martha Washington's will*. *Dandridge v. Washington*, 2 Pet. 370, 7 L. Ed. 454.

On a bill filed by a beneficiary under one of the trusts of the will

Where the executor is joined solely in his capacity as executor, whether he be complainant or defendant, he should scrupulously maintain the attitude of impartiality between the heirs, devisees or other parties in interest. His sole duty is to represent the estate. He should not take sides between the claimants,²³ nor against the validity of the will,²⁴ and he has no personal interest that will entitle him to appeal from the decision of the court.²⁵

§ 109. Various principles governing construction by equity

The unsuccessful contest of the will does not estop a legatee from claiming his interest,²⁶ nor does an agreement not to contest a will preclude a construction of its terms.²⁷ In fact to ask to have a will construed is not claiming against the will,

the court will not pass on the other trusts not involved. *Landram v. Jordan*, 25 App. D. C. 291.

²³ *Goldtree v. Thompson*, 83 Cal. 420, 23 Pac. 383.

In a suit for the construction of wills counsel who appear for the executor or trustee ought not to appear and act for legatees and devisees under the will; sound policy forbids such a practice. *Smith v. Jordan*, 77 Conn. 469, 59 Atl. 507.

The executor cannot maintain a suit to determine the exact estate a devisee took, after the estate has been fully settled and distributed. *Miles v. Strong*, 60 Conn. 398, 22 Atl. 959.

²⁴ *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585.

²⁵ *Earth v. Richter*, 12 Colo. App. 365, 55 Pac. 610; *Virden v. Hubbard*, 37 Colo. 37, 86 Pac. 113.

²⁶ *Guthrie v. Wheeler*, 51 Conn. 207-212.

²⁷ *Robbins v. Co. Com'rs*, 50 Colo. 610, 115 Pac. 526.

but is recognizing its validity as a probated instrument.²⁸

Courts of one state will not construe a will so far as it relates to lands in another state,²⁹ nor are they bound by the construction of the courts of another state, even that of the testator's domicile, involving lands in the former state.³⁰

It is a general rule that what a court cannot enforce it cannot decree.

The court is not bound to answer questions which are premature or based on contingencies that may never occur,³¹ nor give advice as to property which forms no part of the trust estate,³² under the gen-

²⁸ *Beerman v. De Give*, 112 Ga. 614, 37 S. E. 883; *Emmons v. Garnett*, 18 D. C. 52.

²⁹ *Harmon v. Harmon*, 80 Conn. 44, 66 Atl. 771.

A suit to determine the construction of a will and the disposition of a trust fund created thereby is properly brought in the county of the testator's domicile and where the will is probated, though none of the parties reside there and the trust fund has been converted into realty in another state. *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33.

³⁰ *Clark's Appeal*, 70 Conn. 195, 39 Atl. 155; *Coveney v. Conlin*, 20 App. D. C. 303-330; *Handley v. Palmer* (C. C.) 91 Fed. 948; *Bank v. Harrison*, 68 Ga. 463.

It is a general rule that a will of personal property must be construed according to the law of the testator's domicile, and not the domicile of the legatees; but under the Kansas statute the interpretation of foreign wills, even of land, must be according to the law of the testator's domicile. *In re Estate of Riesenbergs*, 116 Mo. App. 313, 90 S. W. 1170; *Keith v. Eaton*, 58 Kan. 732, 51 Pac. 271.

³¹ *Smith v. Jordan*, 77 Conn. 469, 59 Atl. 507; *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320; *Lich v. Lich*, 158 Mo. App. 400, 138 S. W. 558.

³² *Morton Tr. Co. v. Chittenden*, 81 Conn. 105, 70 Atl. 648.

eral rule that equity will not entertain a suit unless it is necessary to preserve some right.³³

Equity has no jurisdiction to reform a will.³⁴

The construction of a will like that of a contract in writing is always a question of law,³⁵ and the decision of the trial court is not binding on the appellate tribunal.³⁶

The limitation by statute for contesting a will does not apply to a suit for construction.³⁷

The construction of a will is *res adjudicata* as to all parties before the court,³⁸ and the doctrine of

³³ *Clark v. Carter*, 200 Mo. 515, 98 S. W. 594.

Conceding the jurisdiction of equity to construe will on proper action by executors it is not bound to do so, and should not except in a case where there is some special reason for seeking its interposition other than a mere desire to obtain the opinion of a court of equity as to the proper construction of the will. *Siddall v. Harrison*, 73 Cal. 560, 15 Pac. 130.

³⁴ *Oliver v. Henderson*, 121 Ga. 836-839, 49 S. E. 743, 104 Am. St. Rep. 185; *Crawley v. Kendrick*, 122 Ga. 183-188, 50 S. E. 41, 2 Ann. Cas. 643.

³⁵ *Bruck v. Tucker*, 42 Cal. 346; *Summerhill v. Hanner*, 72 Tex. 224, 9 S. W. 881; *Shepherd v. White*, 11 Tex. 346-358; *Cox v. Weems*, 64 Ga. 165; *Philips v. Crews*, 65 Ga. 274.

³⁶ *Estate of Blake*, 157 Cal. 448, 108 Pac. 287; *Preston v. Foster*, 75 Conn. 709, 55 Atl. 558; *Lich v. Lich*, 158 Mo. App. 400, 138 S. W. 558; *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166.

³⁷ *Robbins v. Co. Com'rs*, 50 Colo. 610, 115 Pac. 526; *Tincher v. Arnold*, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917.

³⁸ *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132; *Metz v. Wright*, 116 Mo. App. 631, 92 S. W. 1125; *Lowe v. Holder*, 106 Ga. 879, 33 S. E. 30.

stare decisis applies to future constructions of the same will.³⁹

An allowance of costs and expenses against the estate in a suit for construction is within the discretion of the court.⁴⁰

§ 110. In an action at law

The original, and in fact, the only method under common law practice to construe a will devising legal titles to real property was an action of ejectment. This also was the only way, at common law, of determining the validity of the will as a testamentary instrument. Under the American practice the enlarged powers of the probate courts to admit to probate wills of lands has superseded the use of the action of ejectment to determine the validity of such will. It is still useful, however, as a method of construing the meaning of wills disposing of legal titles only.⁴¹ The action of replevin serves the same purpose as to the title to personal

³⁹ *Farnam v. Farnam*, 83 Conn. 369, 77 Atl. 70; *Allen v. Davies*, 85 Conn. 172, 82 Atl. 189; *Coombs v. O'Neal*, 1 MacArthur (8 D. C.) 405.

⁴⁰ *Simon's Will*, 55 Conn. 239, 11 Atl. 36; *Horton v. Upham*, 72 Conn. 29, 43 Atl. 492; *Albert v. Sanford*, 201 Mo. 117, 99 S. W. 1068; *Hurst v. Weaver*, 75 Kan. 758-763, 90 Pac. 297; *Smullin v. Wharton*, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441.

The heir who unsuccessfully attacks a charitable trust is not entitled to have his costs and attorney fees charged against the estate. *Tinch-er v. Arnold*, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917. See, also, *Simmons v. Hubbard*, 50 Conn. 574; *Hinckley v. Stebbins*, 3 Cal. Unrep. Cas. 478, 29 Pac. 52.

⁴¹ *Austin v. Chambers*, 33 Okl. 40, 124 Pac. 310.

property.⁴² In many states statutory actions to try title have proven so simple and effective that they have superseded the cumbrous common law actions.⁴³

§ 111. By the federal courts

We have seen that the probate of a will presents no federal question. Neither does the construction of a will, as the whole subject of the devolution of property on the death of the owner is within the reserved powers of the states. But the federal courts have, in addition to their federal powers, a jurisdiction over all actions at law or in equity between citizens of different states. Under this branch of their jurisdiction they have frequent occasion to construe wills. As courts of equity they will entertain a bill, or a suit may be removed from the state court, if the necessary diverse citizenship ex-

⁴² *Gaines v. Carriker*, 50 Mo. 564; *Mead v. Jennings*, 46 Mo. 91; *Small v. Field*, 102 Mo. 104, 14 S. W. 815; *Dugans v. Livingston*, 15 Mo. 230; *Crecelius v. Horst*, 78 Mo. 566, affirming s. c., 9 Mo. App. 51; *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288; *Preston v. Brant*, 96 Mo. 552, 10 S. W. 78; *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786.

The district court has original jurisdiction, where the plaintiff's claim involves the construction of a will, as a suit against the executor for personal property and damages for its detention. *Howze v. Howze*, 14 Tex. 232.

⁴³ *Simmons v. Cabanne*, 177 Mo. 345, 76 S. W. 618; *Mueller v. Buenger*, 184 Mo. 460, 83 S. W. 458, 67 L. R. A. 648, 105 Am. St. Rep. 541; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481.

Suit for construction of will or to try title thereunder should not proceed until will contest is determined. *State ex rel. v. McQuillin*, 246 Mo. 517, 152 S. W. 347.

ists, whether the suit be by an executor or administrator with the will annexed for directions in carrying out the will,⁴⁴ or by a beneficiary against testamentary trustees.⁴⁵ As courts of law, the federal courts may, where the necessary diversity of citizenship exists take jurisdiction, either by original action or by removal from the state court of any action to try title or recover real or personal property that would lie in the state court. The courts of the United States treat their jurisdiction in these matters as substitutionary in a sense, for the state jurisdiction. They insist that the execution, validity and probate of the will be established under the state law.⁴⁶ If the will has been construed by the highest court of the state the federal court will follow such construction.⁴⁷ It will follow also the

⁴⁴ *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396; *Toms v. Owen* (C. C.) 52 Fed. 417; *Wood v. Paine* (C. C.) 66 Fed. 807 (R. I.).

⁴⁵ *Parsons v. Lyman*, 32 Conn. 566, Fed. Cas. No. 10,780.

⁴⁶ *Toms v. Owen* (C. C.) 52 Fed. 417.

⁴⁷ *Barker v. Eastman* (C. C.) 192 Fed. 659, following *Edgerly v. Barker*, 66 N. H. 434, 31 Atl. 900, 28 L. R. A. 328.

Contra: *Lane v. Vick*, 3 How. 464, 11 L. Ed. 681.

Where the circuit court of appeals has before it in the second trial of the same case a will previously construed by it, and meanwhile the highest court of the state in which the real estate affected is situated has construed the will differently, the circuit court of appeals is not bound to adhere to its previous decision as being the law of the case. It may follow, and in such case should lean toward, an agreement, with the state court. *Messinger v. Anderson*, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152 (171 Fed. 785, 96 C. C. A. 445, reversed; 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. [N. S.] 1094, reversed); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N. E. 644; s. c., 222 U. S. 164, 32 Sup. Ct. 50, 56 L. Ed. 144, followed.

state construction of local statutes ⁴⁸ and the rules of real property as applied by the state tribunals in like cases.⁴⁹

CANONS OF CONSTRUCTION

§ 112. Words and phrases

A will is of all instruments the most informal and the least bound by technical rules of construction. We have seen that no set form of words or phrases is necessary in a will; nor are there any established or generally received forms, construed and settled by a long line of precedents, as is the case in deeds. The cardinal rule in the construction of wills is that the intention of the testator must control where it is not in conflict with any statute or positive rule of law. This intention the courts seek out and try to enforce even though the testator may have disregarded all technical forms of expression and clothed his meaning in informal, obscure or even incorrect language. Great indulgence is shown to the testator in not allowing his intentions to be defeated by lack of skill in expressing them. As is well said in a late case:

In construing wills, courts must not lose sight of the fact that unlike contracts they spring from the better part of human nature, and in order to be construed in a natural manner, they must be construed in a way that best accords with what

⁴⁸ *Yocum v. Parker*, 134 Fed. 205, 67 C. C. A. 227.

⁴⁹ *Warring v. Jackson*, 1 Pet. 570, 7 L. Ed. 266; *Myrick v. Heard* (C. C.) 31 Fed. 241; *De Vaughn v. Hutchinson*, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827.

the heart of the testator would dictate, if left unfettered by technical rules.⁵⁰

The intention of the testator has been described as the guiding principle—the pole star—of construction of wills. For this reason the number of adjudged cases in which wills have been construed is very large, and it has often been said that it is impossible to extract from them any definite set of rules that will serve as a guide in all cases. Very little aid can be procured from adjudged cases in the construction of wills, except for the establishment of general principles. It seldom happens that two cases can be found precisely alike.⁵¹

There are some rules of construction which are fairly well settled, however, and some that have been enacted by statute.⁵²

⁵⁰ *Small v. Field*, 102 Mo. 104, 14 S. W. 815; *Heywood's Estate*, 148 Cal. 184, 82 Pac. 755; *Wood's Estate*, 36 Cal. 75; *Welch v. Huse*, 49 Cal. 507; *Atkins v. Best*, 27 App. D. C. 148; *Griffith v. Witten*, 252 Mo. 627, 161 S. W. 708; *Estate of Goetz*, 13 Cal. App. 266, 109 Pac. 105; *Estate of Goetz*, 13 Cal. App. 292, 109 Pac. 492; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268.

⁵¹ *Rosenberg v. Frank*, 58 Cal. 387; *Estate of Henderson*, 161 Cal. 353, 119 Pac. 496; *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320; *Hartford Tr. Co. v. Wolcott*, 85 Conn. 134, 81 Atl. 1057; *Cook v. Weaver*, 12 Ga. 47; *Olmstead v. Dunn*, 72 Ga. 850.

⁵² Rules of Construction listed. *Cox v. Jones*, 229 Mo. 53-62, 129 S. W. 495.

Statutory rules of construction. *Craig v. Ambrose*, 80 Ga. 134-136, 4 S. E. 1; *Estate of Goetz*, 13 Cal. App. 266, 109 Pac. 105; *Estate of Goetz*, 13 Cal. App. 292, 109 Pac. 492; *In re Poppleton's Estate*, 34 Utah, 285, 97 Pac. 138, 131 Am. St. Rep. 842.

First: The intention of the testator must prevail, unless contrary to some positive rule of law.⁵³

⁵³ *Johnson v. Wash. L. & R. Co.*, 33 App. D. C. 242; *Frosch v. Monday*, 34 App. D. C. 338; *Lines v. Darden*, 5 Fla. 51; *Wetter v. U. H. C. P. Co.*, 75 Ga. 540; *Weed v. Knorr*, 77 Ga. 636, 1 S. E. 167; *Burnet v. Burnet*, 244 Mo. 491, 148 S. W. 872; *Hill v. Hill*, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198; *Griffin v. Morgan* (D. C.) 208 Fed. 660 (Vt.); *University of Colorado v. Wilson*, 54 Colo. 510, 131 Pac. 422; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524; *Heywood v. Heywood*, 92 Neb. 72, 137 N. W. 984; *Marion v. Williams*, 20 D. C. 20; *Philleo v. Holliday*, 24 Tex. 38; *Brooks v. Evetts*, 33 Tex. 732; *Laval v. Staffel*, 64 Tex. 370; *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. 854; *Sanger v. Butler*, 45 Tex. Civ. App. 527, 101 S. W. 459; *Bredell v. Collier*, 40 Mo. 321; *Mead v. Jennings*, 46 Mo. 91; *Turner v. Timberlake*, 53 Mo. 375; *Gaines v. Fender*, 57 Mo. 346; *Carr v. Dings*, 58 Mo. 406; *Smith v. Hutchinson*, 61 Mo. 87; *Allison v. Chaney*, 63 Mo. 279; *Shumate v. Bailey*, 110 Mo. 411, 20 S. W. 178; *Redman v. Barger*, 118 Mo. 568, 24 S. W. 177; *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786; *Briant v. Garrison*, 150 Mo. 655, 52 S. W. 361; *Hurst v. Von de Veld*, 158 Mo. 246, 58 S. W. 1056; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Wendler v. Lambeth*, 163 Mo. 428, 63 S. W. 684; *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238; *Harbison v. Swan*, 58 Mo. 147; *Russell v. Eubanks*, 84 Mo. 82; *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288; *Brown v. Rogers*, 125 Mo. 392, 28 S. W. 630; *Briant v. Garrison*, 150 Mo. 655, 52 S. W. 361; *Lemmons v. Reynolds*, 170 Mo. 227, 71 S. W. 135; *Peugnet v. Berthold*, 183 Mo. 61, 81 S. W. 874; *Bilger v. Nunan*, 199 Fed. 549, 118 C. C. A. 23; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617; *Hardenbergh v. Ray*, 151 U. S. 112, 14 Sup. Ct. 305, 38 L. Ed. 93; *Home for Incurables v. Noble*, 172 U. S. 383, 19 Sup. Ct. 226, 43 L. Ed. 486; *Adams v. Cowen*, 177 U. S. 471, 20 Sup. Ct. 668, 44 L. Ed. 851; *Travers v. Reinhardt*, 205 U. S. 423, 27 Sup. Ct. 563, 51 L. Ed. 865; *Ruston v. Ruston*, 2 Dall. (Pa.) 243, 1 L. Ed. 365; *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701; *Robison v. Female Orphan Asylum*, 123 U. S. 702, 8 Sup. Ct. 327, 31 L. Ed. 293; *Coltman v. Moore*, 1 MacArthur (D. C.) 197; *Earnshaw v. Daly*, 1 App. D. C. 218; *De Vaughn v. De Vaughn*, 3 App. D. C. 50; *Holcomb v. Wright*, 5 App. D. C. 76; *Bradford v. Matthews*, 9 App. D. C. 438; *Montgomery v. Brown*, 25 App. D.

Second: Where the intention cannot have effect to its full extent it must have effect as far as possible.⁵⁴

C. 490; *Cruit v. Owen*, 25 App. D. C. 514; *Alford v. Alford*, 56 Ala. 350; *Wolfe v. Loeb*, 98 Ala. 426, 13 South. 744; *Campbell v. Weakley*, 121 Ala. 64, 25 South. 694; *Smith v. Smith*, 157 Ala. 79, 47 South. 220, 25 L. R. A. (N. S.) 1045; *Campbell v. Campbell*, 13 Ark. 513; *Cockrill v. Armstrong*, 31 Ark. 580; *Gregory v. Welch*, 90 Ark. 152, 118 S. W. 404; *Parker v. Wilson*, 98 Ark. 553, 136 S. W. 981; *In re Stewart*, 74 Cal. 101, 15 Pac. 445; *Whitcomb's Estate*, 86 Cal. 273, 24 Pac. 1028; *Kauffman v. Gries*, 141 Cal. 299, 74 Pac. 846; *Willey's Estate*, 128 Cal. 1, 56 Pac. 550; *Estate of Barclay*, 152 Cal. 753, 93 Pac. 1012; *Platt v. Brannan*, 34 Colo. 125, 81 Pac. 755, 114 Am. St. Rep. 147; *Cowell v. So. Denver R. E. Co.*, 16 Colo. App. 108, 63 Pac. 991; *Williams v. Dickerson*, 2 Root (Conn.) 194, 1 Am. Dec. 66; *Everts v. Chittendon*, 2 Day (Conn.) 350, 2 Am. Dec. 97; *Couch v. Gorham*, 1 Conn. 39; *Greene v. Dennis*, 6 Conn. 299, 16 Am. Dec. 58; *Allyn v. Mather*, 9 Conn. 125; *Matthewson v. Saunders*, 11 Conn. 149; *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320; *Pease v. Cornell*, 84 Conn. 391, 80 Atl. 86; *Doe ex dem. Patton v. Dillon*, 1 Mar. (Del.) 232, 40 Atl. 1106.

However unjust it may appear. *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238; *Dameron v. Lanyon*, 234 Mo. 627-646, 138 S. W. 1.

Contrary to rules of law. *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409, 50 L. R. A. 361; *Lester v. Stephens*, 113 Ga. 495-499, 39 S. E. 109.

"The intention of the testator shall govern the construction of a will in all cases, except where the rule of law overrules the intention, and this is reducible to four instances: (1) Where the devise would make a perpetuity; (2) where it would put the freehold in abeyance; (3) where chattels are limited as inheritances; (4) where a fee is limited on a fee." *Ruston v. Ruston*, 2 Dall. (Pa.) 243, 1 L. Ed. 365. This is far from being accurate in its enumeration. The last two would be sustained as executory devises. There are many instances omitted where the devise is contrary to law.

⁵⁴ *McClellan v. Weaver*, 4 Cal. App. 593, 88 Pac. 646; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513.

Chancellor has power to decree an approximation to the plans of the testator, where literal performance of the will becomes impossible. *Blake v. Black*, 84 Ga. 392, 11 S. E. 494; *Southern Marble Co.*

Third: The intention must be gathered from the whole will and not from detached portions thereof.⁵⁵

v. Stegall, 90 Ga. 236, 15 S. E. 806; Title Guar. Co. v. Holverson, 95 Ga. 707-711, 22 S. E. 533; Harvey v. Miller, 95 Ga. 766-769, 22 S. E. 668; Beavers v. Harvey, 102 Ga. 184, 29 S. E. 163.

⁵⁵ Erwin v. Henry, 5 Mo. 469; Norcum v. D'Oench, 17 Mo. 98; Chiles v. Bartleson, 21 Mo. 346; Carr v. Dings, 58 Mo. 406; Allison v. Chaney, 63 Mo. 279; Reinders v. Koppelman, 94 Mo. 338, 7 S. W. 288; Munro v. Collins, 95 Mo. 37, 7 S. W. 461; Preston v. Brant, 96 Mo. 552, 10 S. W. 78; Chew v. Keller, 100 Mo. 362, 13 S. W. 395; Lewis v. Pitman, 101 Mo. 281, 14 S. W. 52; Nichols v. Boswell, 103 Mo. 151, 15 S. W. 343; Ringquist v. Young, 112 Mo. 25, 20 S. W. 159; McMillan v. Farrow, 141 Mo. 62, 41 S. W. 890; Thomas v. Thomas, 149 Mo. 435, 51 S. W. 111, 73 Am. St. Rep. 405; Brooks v. Brooks, 187 Mo. 476, 86 S. W. 158; Grace v. Perry, 197 Mo. 550, 95 S. W. 875, 7 Ann. Cas. 948; McGraw v. McGraw, 176 Fed. 312, 99 C. C. A. 650; Parker v. Wilson, 98 Ark. 553, 136 Pac. 981; Heywood's Estate, 148 Cal. 184, 82 Pac. 755; Estate of Peabody, 154 Cal. 173, 97 Pac. 184; Estate of Koch, 8 Cal. App. 90, 96 Pac. 100; White v. White, 52 Conn. 518; Beers v. Narramore, 61 Conn. 13, 22 Atl. 1061; Plant v. Plant, 80 Conn. 673, 70 Atl. 52; Robinson v. Adams, 4 Dall. (Del.) App. xii, 1 L. Ed. 920; Lane v. Vick, 3 How. 464, 472, 11 L. Ed. 681; Hitch v. Patten, 8 Houst. (Del.) 334, 16 Atl. 558, 2 L. R. A. 724; Bacon v. Nichols, 47 Colo. 31, 105 Pac. 1082; Foxall v. McKenney, 3 Cranch, C. C. 206-208, Fed. Cas. No. 5,016; Robert v. West, 15 Ga. 122; Cook v. Weaver, 12 Ga. 47; Brown v. Weaver, 28 Ga. 377; Philips v. Crews, 65 Ga. 274; Rogers v. Highnote, 126 Ga. 740, 56 S. E. 93; Lines v. Darden, 5 Fla. 51; Russ v. Russ, 9 Fla. 105; St. John's Mite Ass'n v. Buckly, 16 D. C. 406; Montgomery v. Brown, 25 App. D. C. 490; Cruit v. Owen, 25 App. D. C. 514; Armor v. Frey, 226 Mo. 646, 126 S. W. 483; Dameron v. Lanyon, 234 Mo. 627, 138 S. W. 1; Threlkeld v. Threlkeld, 238 Mo. 459, 141 S. W. 1121; Cornet v. Cornet, 248 Mo. 184, 154 S. W. 121; Heaton v. Dickson, 153 Mo. App. 312, 133 S. W. 159; In re Estate of Buerstetta, 83 Neb. 287, 119 S. W. 469; Fauber v. Keim, 85 Neb. 217, 122 N. W. 849; Sims v. Brown, 252 Mo. 58, 158 S. W. 624; Marsh v. Marsh, 92 Neb. 189, 137 N. W. 1122; Chick v. Ives, 2 Neb. Unof. 879, 90 N. W. 751; Jones v. Hudson, 93 Neb. 561, 141 N. W. 141, 44 L. R. A. (N. S.) 1182; McMurry v. Stanley, 69 Tex. 227, 6 S. W. 412; Yeatman v. Haney, 79

Though two parts of a will are seemingly inconsistent, if both may stand, they should be allowed to do so, rather than that any part should perish by construction.⁵⁶

A will and its codicils are to be construed together,⁵⁷

Tex. 67, 14 S. W. 1045; *Cleveland v. Cleveland*, 89 Tex. 445, 35 S. W. 145; *Clark v. Catron*, 23 Tex. Civ. App. 51, 56 S. W. 99; *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303; *In re Poppleton's Estate*, 34 Utah, 285, 97 Pac. 138, 131 Am. St. Rep. 842.

But independent devises and clauses must be construed separately. *Boston S. D. Co. v. Stich*, 61 Kan. 474, 59 Pac. 1082.

⁵⁶ *Varnon v. Varnon*, 67 Mo. App. 534; *Mersman v. Mersman*, 136 Mo. 257, 37 S. W. 909; *Estate of Robinson*, 159 Cal. 608, 115 Pac. 49; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Thornton v. Britton* (C. C.) 8 Fed. 308; *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816; *McGraw v. McGraw*, 176 Fed. 312, 99 C. C. A. 650; *Alfriend v. Fox*, 124 Ga. 563-565, 52 S. E. 925; *Marsh v. Marsh*, 92 Neb. 189, 137 N. W. 1122; *In re Estate of Creighton*, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; *Dulin v. Moore*, 96 Tex. 135, 70 S. W. 742; *Fisher v. Fisher*, 80 Neb. 145, 113 N. W. 1004; *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047; *Martley v. Martley*, 77 Neb. 163, 108 N. W. 979.

Construction which harmonizes with other provisions of will preferred. *John H Estate v. Brown*, 201 Fed. 224, 119 C. C. A. 458 (H. T.).

Alternative provisions. *Tyler v. Thellig*, 124 Ga. 204, 52 S. E. 606.

⁵⁷ *Boyd v. Boyd* (C. C.) 2 Fed. 138; *In re Zeile*, 74 Cal. 125-137, 15 Pac. 455; *De Laveaga's Estate*, 119 Cal. 651, 51 Pac. 1074; *Estate of Barclay*, 152 Cal. 753, 93 Pac. 1012; *Estate of Koch*, 8 Cal. App. 90, 96 Pac. 100; *Estate of Cross*, 163 Cal. 778, 127 Pac. 70; *Bringham v. Orth*, 7 Del. Ch. 178, 44 Atl. 783; *Wells v. Fuchs*, 226 Mo. 97, 125 S. W. 1137; *Marfield v. McMurdy*, 25 App. D. C. 342; *Atwood v. Geiger*, 69 Ga. 498; *McClelland v. Rose*, 208 Fed. 503, 125 C. C. A. 505 (Tex.); *Pardee v. Kuster*, 15 Wyo. 368, 89 Pac. 572, 91 Pac. 836; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391; *Van Cortlandt v. Kip*, 1 Hill (N. Y.) 590; *Brimmer v. Sohler*, 1 Cush. (Mass.) 118; *Neff's Appeal*, 48 Pa. 501; *Snowhill v. Snowhill*, 23 N. J. Law, 447.

the codicil controlling only to the extent necessary to give effect to its provisions.⁵⁸

The courts will, as far as possible, avoid construing isolated words and phrases in a will; for the reason that even ordinary words are much clearer when considered in the light of the context. As to unusual and technical words, the context often reveals that the testator has used them incorrectly.

Fourth: All else being equal, the last of two conflicting clauses will prevail.⁵⁹

This is a very artificial rule and is only applied as a last resort.⁶⁰

Fifth: That construction will be preferred that will accomplish the purpose of the testator.⁶¹

Sixth: If two modes of construction are fairly open, under one of which a bequest would be illegal while

⁵⁸ *Higgins v. Eaton* (C. C.) 188 Fed. 938; *Ladd's Estate*, 94 Cal. 670, 30 Pac. 99; *Scott's Estate*, 141 Cal. 487, 75 Pac. 44; *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107; *Shey's Appeal*, 73 Conn. 122, 46 Atl. 832; *Pardee v. Kuster*, 15 Wyo. 368, 89 Pac. 572, 91 Pac. 836.

⁵⁹ *Hitchcock's Case*, 7 Ala. 386; *Flinn v. Davis*, 18 Ala. 132; *Miller v. Flournoy*, 26 Ala. 724; *Griffin v. Pringle*, 56 Ala. 486; *Chappel v. Avery*, 6 Conn. 34; *Minor v. Ferris*, 22 Conn. 378; *West v. Randle*, 79 Ga. 28, 3 S. E. 454; *Robert v. West*, 15 Ga. 122; *Philips v. Crews*, 65 Ga. 274; *Rogers v. Highnote*, 126 Ga. 740, 56 S. E. 93; *Martley v. Martley*, 77 Neb. 163, 108 N. W. 979.

⁶⁰ *Cox v. Britt*, 22 Ark. 567; *McKenzie v. Roleson*, 28 Ark. 102; *Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1082.

⁶¹ *Barr v. Weaver*, 132 Ala. 212, 31 South. 488; *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238; *Ro Bards v. Brown*, 167 Mo. 457, 67 S. W. 245; *Waters v. Hatch*, 181 Mo. 288, 79 S. W. 916; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681; *Pease v. Cornell*, 84 Conn. 391, 80 Atl. 86.

under the other it would be valid and operative, the latter will be preferred.⁶²

The courts, however, in their anxiety to avoid the failure of the testator's expressed intentions, cannot remake his will. The law at the time the will takes effect enters into its terms,⁶³ and the testator must be presumed to know the law.⁶⁴

Where the language of an express provision of a will is free from doubt, a consequence resulting from it that the testator would not have favored will not be permitted to affect the construction of the will and much less to prevent the application to it of a settled rule of law.⁶⁵

If the plan adopted by the testator for the disposition of his property cannot be given effect because it

⁶² *Edwards v. Bibb*, 43 Ala. 666; *Terrell v. Reeves*, 103 Ala. 264, 16 South. 54; *Estate of Heywood*, 148 Cal. 184, 82 Pac. 755; *Estate of Peabody*, 154 Cal. 173, 97 Pac. 184; *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371; *Rand v. Butler*, 48 Conn. 293; *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Estate of Dunphy*, 147 Cal. 95, 81 Pac. 315; *Fitchie v. Brown*, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202; *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645; *Carpenter v. Perkins*, 83 Conn. 11, 74 Atl. 1062; *Farnam v. Farnam*, 83 Conn. 369, 77 Atl. 70; *Nicoll v. Irby*, 83 Conn. 530, 77 Atl. 957; *McGraw v. McGraw*, 176 Fed. 312, 99 C. C. A. 650; *Robert v. West*, 15 Ga. 122; *Kelly v. Moore*, 22 App. D. C. 9.

⁶³ *Kidwell v. Brummagin*, 32 Cal. 442; *Worrill v. Wright*, 25 Ga. 657; *Cobb v. Battle*, 34 Ga. 458; *Redd v. Hargroves*, 40 Ga. 18; *Bennett v. Williams*, 46 Ga. 399; *Munroe v. Basinger*, 58 Ga. 118; *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409, 50 L. R. A. 361.

⁶⁴ *Estate of Vogt*, 154 Cal. 508, 98 Pac. 265; *Norris v. Hensley*, 27 Cal. 439-445; *Tuckerman v. Currier*, 54 Colo. 25, 129 Pac. 210.

⁶⁵ *Bill v. Payne*, 62 Conn. 140, 25 Atl. 354.

violates the rules of law, the court is not authorized to substitute for the illegal provision some other which it may suppose would have been adopted by him if he had known that the directions actually given could not be carried out.⁶⁶

Seventh: Where the provisions of a will are partly legal and partly illegal, the legal parts will be upheld if capable of separation from the illegal.⁶⁷

If the elimination of the invalid portions so changes the general scheme of the testator as to make the remaining portions amount to a new and different will, the whole must fail.⁶⁸

Where there are alternative provisions and one is void the other may take effect.⁶⁹

Eighth: An obvious general intent, gathered from the whole will, can rarely be defeated by an inac-

⁶⁶ *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371; *In re Walkerly*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; *Fairs' Estate*, 132 Cal. 523, 64 Pac. 1000, 84 Am. St. Rep. 70; *Estate of Lynch*, 142 Cal. 373, 75 Pac. 1086.

⁶⁷ *Lake v. Warner*, 34 Conn. 483; *Bent's Appeal*, 38 Conn. 34; *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320; *Allen v. Davies*, 85 Conn. 172, 82 Atl. 189; *Smith v. Dunwoody*, 19 Ga. 237; *Webb v. Fleming*, 30 Ga. 808, 76 Am. Dec. 675; *Cobb v. Battle*, 34 Ga. 458; *Whitley v. State*, 38 Ga. 75; *Sinnott v. Moore*, 113 Ga. 908-915, 39 S. E. 415; *Landram v. Jordan*, 25 App. D. C. 291; *Board of Trustees v. May*, 201 Mo. 360-371, 99 S. W. 1093; *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 989; *Wells v. Fuchs*, 226 Mo. 97, 125 S. W. 1137.

⁶⁸ *White v. Allen*, 76 Conn. 185, 56 Atl. 519; *Lepard v. Clapp*, 80 Conn. 29, 66 Atl. 780; *Sevier v. Woodson*, 205 Mo. 202, 104 S. W. 1, 120 Am. St. Rep. 728; *Reid v. Voorhees*, 216 Ill. 236, 74 N. E. 804, 3 Ann. Cas. 946; *Holdren v. Holdren*, 78 Ohio St. 276, 85 N. E. 537, 18 L. R. A. (N. S.) 272; *Fennell v. Fennell*, 80 Kan. 730, 106 Pac. 1038, 18 Ann. Cas. 471.

⁶⁹ *Colbert v. Speer*, 24 App. D. C. 187.

curacy or inconsistency in the expression of a particular intent.⁷⁰

Where the words of the will indicate an intent to make a clear gift such gift is not cut down by any subsequent provisions which are of indefinite or doubtful meaning.⁷¹

On the other hand, general expressions of a purpose in a will do not override special directions as to a particular property, the disposal of which is minutely provided for.⁷²

Ninth: Words, including technical words, are pre-

⁷⁰ *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458; *Walker v. Atmore*, 50 Fed. 644, 1 C. C. A. 595, affirming (C. C.) 46 Fed. 429; *Estate of Mayhew*, 4 Cal. App. 162, 87 Pac. 417; *Goodrich v. Lambert*, 10 Conn. 452; *Farnam v. Farnam*, 53 Conn. 289, 2 Atl. 325, 5 Atl. 682; *Wheeler v. Fellowes*, 52 Conn. 241; *Phelps v. Bates*, 54 Conn. 15, 5 Atl. 301, 1 Am. St. Rep. 92; *Hurd v. Shelton*, 64 Conn. 496, 30 Atl. 766; *Pinney v. Newton*, 66 Conn. 141, 33 Atl. 591; *Beardsley's Appeal*, 77 Conn. 705, 60 Atl. 664; *Lepard v. Clapp*, 80 Conn. 29, 66 Atl. 780; *Workman v. Cannon's Lessee*, 5 Har. (Del.) 91; *Peters v. Carr*, 16 Mo. 54; *Sheriff v. Brown*, 16 D. C. 172; *Robert v. West*, 15 Ga. 122; *Lake v. Copeland*, 82 Tex. 464, 17 S. W. 786; *Cooper v. Homer*, 62 Tex. 356; *Peet v. Ry.*, 70 Tex. 522, 8 S. W. 203.

General scheme of will. *Langford v. Langford*, 79 Ga. 520, 4 S. E. 900; *In re Estate of Offutt*, 159 Mo. App. 90, 139 S. W. 487.

⁷¹ *Ballantine v. Ballantine* (C. C.) 152 Fed. 775; *Sherrod v. Sherrod*, 38 Ala. 543; *Estate of Richards*, 154 Cal. 478, 98 Pac. 528; *Fanning v. Main*, 77 Conn. 94, 58 Atl. 472; *Strong v. Elliott*, 84 Conn. 665, 81 Atl. 1020; *Felton v. Hill*, 41 Ga. 554; *Sheftall v. Roberts*, 30 Ga. 453; *Cochran v. Hudson*, 110 Ga. 762-764, 36 S. E. 71; *Sevier v. Woodson*, 205 Mo. 202, 104 S. W. 1, 120 Am. St. Rep. 728; *Settle v. Shafer*, 229 Mo. 561, 129 S. W. 897; *John II Estate v. Brown*, 201 Fed. 224, 119 C. C. A. 458; *In re Campbell*, 27 Utah, 361, 75 Pac. 851; *McGuigan v. Jaeger*, 36 App. D. C. 227; *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047.

⁷² *Mersman v. Mersman*, 136 Mo. 244, 37 S. W. 909; *E. G. T. Co.*

sumed to be used in their strict and primary acceptance, unless from the context it appears that the testator used them in a different sense.⁷³

The context may give to certain words a meaning that they do not ordinarily or properly possess.⁷⁴

v. Rogers, 7 Del. Ch. 398, 44 Atl. 789; *Lamar v. McLaren*, 107 Ga. 591, 34 S. E. 116.

Statutory rule of construction. "A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will." *Estate of Goetz*, 13 Cal. App. 266, 109 Pac. 105; *Id.*, 13 Cal. App. 292, 109 Pac. 492.

⁷³ *Estate of Curry*, 39 Cal. 529; *Wadsworth v. Wadsworth*, 74 Cal. 104, 15 Pac. 447; *In re Stewart*, 74 Cal. 103, 15 Pac. 445; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681; *Kauffman v. Gries*, 141 Cal. 300, 74 Pac. 846; *Estate of Roach*, 159 Cal. 260, 113 Pac. 373; *Platt v. Brannan*, 34 Colo. 125, 81 Pac. 755, 114 Am. St. Rep. 147; *Rand v. Butler*, 48 Conn. 293; *Leake v. Watson*, 60 Conn. 508, 21 Atl. 1075; *Nicoll v. Irby*, 83 Conn. 530, 77 Atl. 957; *Pease v. Cornell*, 84 Conn. 391, 80 Atl. 86; *Kean's Lessee v. Hoffecker*, 2 Har. (Del.) 103, 29 Am. Dec. 336; *Drake v. Crane*, 127 Mo. 85, 29 S. W. 990, 27 L. R. A. 653; *White v. Crawford*, 87 Mo. App. 262; *Carr v. Dings*, 58 Mo. 406; *Suydam v. Thayer*, 94 Mo. 49, 6 S. W. 502; *Small v. Field*, 102 Mo. 123, 14 S. W. 815; *Redman v. Barger*, 118 Mo. 573, 24 S. W. 177; *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786; *Wendler v. Lambeth*, 163 Mo. 428, 63 S. W. 684; *O'Day v. O'Day*, 193 Mo. 89, 91 S. W. 921, 4 L. R. A. (N. S.) 922; *Metz v. Wright*, 116 Mo. App. 631, 92 S. W. 1125; *De Bardelaben v. Dickson*, 166 Ala. 59, 51 South. 986; *Capal v. McMillan*, 8 Port. (Ala.) 197; *Estate of Henderson*, 161 Cal. 353, 119 Pac. 496; *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *McLeod v. Dell*, 9 Fla. 427; *Wiegand v. Woerner*, 155 Mo. App. 227, 134 S. W. 596; *Lich v. Lich*, 158 Mo. App. 400, 138 S. W. 558; *Choice v. Marshall*, 1 Ga. 97; *In re Poppleton's Estate*, 34 Utah, 285, 97 Pac. 138, 131 Am. St. Rep. 842.

⁷⁴ *Hurd v. Shelton*, 64 Conn. 496, 30 Atl. 766; *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645; *Butler v. Butler*, 13 D. C. 96.

The primary legal meaning of "children" is descendants in the first

The testator's understanding of the words used in his will, ascertained from the will itself, must be

degree. *Adams v. Law*, 17 How. 417, 15 L. Ed. 149; *McGuire v. Westmoreland*, 36 Ala. 594; *Estate of Curry*, 39 Cal. 529; *Carpenter v. Perkins*, 83 Conn. 11, 74 Atl. 1062; *McLeod v. Dell*, 9 Fla. 427; *Lich v. Lich*, 158 Mo. App. 400, 138 S. W. 558; *White v. Rowland*, 67 Ga. 546, 44 Am. Rep. 731; *Lyon v. Baker*, 122 Ga. 189, 50 S. E. 44; *Fulghum v. Strickland*, 123 Ga. 258, 51 S. E. 294; *Willis v. Jenkins*, 30 Ga. 167; *Walker v. Williamson*, 25 Ga. 549.

But "children" may mean "grandchildren." *Scott v. Nelson*, 3 Port. (Ala.) 452, 29 Am. Dec. 266; *McGuire v. Westmoreland*, 36 Ala. 594; *Phinizy v. Foster*, 90 Ala. 262, 7 South. 836; *Edwards v. Bender*, 121 Ala. 77, 25 South. 1010; *In re Schedel*, 73 Cal. 594, 15 Pac. 297; *Rhoton v. Blevin*, 99 Cal. 645, 34 Pac. 513; *Caulk v. Caulk*, 3 Pennewill (Del.) 528, 52 Atl. 340; *Griffith v. Witten*, 252 Mo. 627, 161 S. W. 708.

"Children" includes legitimated child. *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Carroll v. Carroll*, 20 Tex. 731.

Does not include illegitimate children. *Johnstone v. Taliaferro*, 107 Ga. 6, 32 S. E. 931, 45 L. R. A. 95.

Includes those by a former marriage. *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 929.

Whether an adopted child takes under the general term "children" has been decided both ways.

Pro: *Tirrell v. Bacon* (C. C.) 3 Fed. 62.

Contra: *Russell v. Russell*, 84 Ala. 48, 3 South. 900.

"Children" as ordinarily used in devises is a word of purchase and not of limitation. Words of limitation are "issue" or "heirs of the body." *Forest Oil Co. v. Crawford*, 77 Fed. 106, 23 C. C. A. 55; *Vaughan v. Parr*, 20 Ark. 600; *Caulk v. Caulk*, 3 Pennewill (Del.) 528, 52 Atl. 340; *Kemp v. Daniel*, 8 Ga. 385; *Carlton v. Price*, 10 Ga. 495; *Cooper v. Mitchell Inv. Co.*, 133 Ga. 769, 66 S. E. 1090, 29 L. R. A. (N. S.) 291; *McLeod v. Dell*, 9 Fla. 427.

The word "heirs" when used in a will primarily signifies those entitled by law to inherit by descent the real estate of a deceased person; and a resort to secondary meanings of the word will ordinarily be had only when adherence to the primary meaning of the word would make the provision under consideration ineffectual or plainly

adopted without resorting to lexicographers to determine what the same words may mean in the abstract;

unreasonable. *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885; *Perry v. Buckley*, 82 Conn. 158, 72 Atl. 1014; *Heald v. Briggs*, 83 Conn. 5, 74 Atl. 1123; *Nicoll v. Irby*, 83 Conn. 530, 77 Atl. 957; *Hartford Tr. Co. v. Purdue*, 84 Conn. 256, 79 Atl. 581.

The word "heirs" used in gifts of personalty refers primarily to those entitled to take under the statute of distributions. *Vogt v. Vogt*, 26 App. D. C. 46.

"Heirs" is prima facie a word of limitation and not of purchase. *Daly v. James*, 8 Wheat. 495, 5 L. Ed. 670; *Smith v. Greer*, 88 Ala. 414, 6 South. 911; *Edwards v. Bender*, 121 Ala. 77, 25 South. 1010; *Gold v. Judson*, 21 Conn. 616; *Healy v. Healy*, 70 Conn. 467, 39 Atl. 793; *Gerard v. Ives*, 78 Conn. 485, 62 Atl. 607; *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968; *Coleman v. Coleman*, 69 Kan. 39, 76 Pac. 439; *Carnes v. Baker*, 100 Ga. 779, 28 S. E. 496; *Tebow v. Dougherty*, 205 Mo. 315-322, 103 S. W. 985; *Brooks v. Evetts*, 33 Tex. 732.

But may be words of purchase. *Findley v. Hill*, 133 Ala. 232, 32 South. 497; *State v. Lyons*, 5 Har. (Del.) 196; *Leake v. Watson*, 60 Conn. 506, 21 Atl. 1075; *Frosch v. Walter*, 228 U. S. 109, 33 Sup. Ct. 494, 57 L. Ed. 750.

In many cases "heirs" has been held to mean "children." *Watson v. Williamson*, 129 Ala. 362, 30 South. 281; *Guesnard v. Guesnard*, 173 Ala. 250, 55 South. 524; *Campbell v. Noble*, 110 Ala. 382, 19 South. 28; *Robinson v. Bishop*, 23 Ark. 378; *Slaughter v. Slaughter*, 23 Ark. 356, 79 Am. Dec. 111; *Lockwood's Appeal*, 55 Conn. 157, 10 Atl. 517; *Anthony v. Anthony*, 55 Conn. 256, 11 Atl. 45; *Pease v. Cornell*, 84 Conn. 391, 80 Atl. 86; *Waddell v. Waddell*, 99 Mo. 345, 12 S. W. 349, 17 Am. St. Rep. 575; *Maguire v. Moore*, 108 Mo. 267, 18 S. W. 897; *Cross v. Hoch*, 149 Mo. 342, 50 S. W. 786; *De Vaughn v. De Vaughn*, 3 App. D. C. 50; *Claxton v. Weeks*, 21 Ga. 265; *Brown v. Tuschoff*, 235 Mo. 449, 138 S. W. 497; *Ford v. Cook*, 73 Ga. 215; *Baxter v. Winn*, 87 Ga. 239, 13 S. E. 634.

"Heirs" held not to mean children. *De Bardelaben v. Dickson*, 166 Ala. 59, 51 South. 986; *Thomas v. Owens*, 131 Ga. 248-256, 62 S. E. 218.

Held not to include adopted child. *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288.

"Heirs" may mean legatees, but will scarcely embrace corporate

or to adjudicated cases to discover what they have been decided to mean under different circumstances.⁷⁵

legatees. *Graham v. De Yampert*, 106 Ala. 279, 17 South. 355; *Lallerstedt v. Jennings*, 23 Ga. 571.

No one is heir of the living. *Goodrich v. Lambert*, 10 Conn. 449-452.

Wife is not ordinarily included in the word "heirs." *Morris v. Bolles*, 65 Conn. 45, 31 Atl. 538; *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885.

A husband is not the right heir of his wife in the strict and primary sense of the term. *Mason v. Baily*, 6 Del. Ch. 129, 14 Atl. 209; *Wetter v. Walker*, 62 Ga. 142.

But context may show that "wife" is included in the term "heirs at law." *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645; *Burr v. Burr*, 163 Mo. App. 395-412, 143 S. W. 1096; *Gibbon v. Gibbon*, 40 Ga. 562.

The word "issue" may be either a word of purchase or of inheritance as best answers the intention of the testator. *McDonnell's Estate*, Myr. Prob. (Cal.) 94.

"Issue" means descendants of any degree. *Cavarly's Estate*, 119 Cal. 406, 51 Pac. 629; *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *Perry v. Buckley*, 82 Conn. 158, 72 Atl. 1014; *Schafer v. Ballou*, 35 Okl. 169, 128 Pac. 498.

"Issue" may mean children. *Edwards v. Bibb*, 43 Ala. 666.

"Issue" means prima facie legitimate issue. *Flora v. Anderson* (C. C.) 67 Fed. 182.

"Descendants" means those who have issued from an individual, including his children, grandchildren and their children to the remotest generation. *Tichenor v. Brewer*, 98 Ky. 349, 33 S. W. 86; *West v. West*, 89 Ind. 529; *Gordon v. Pendleton*, 84 N. C. 98; *Van Beuren v. Dash*, 30 N. Y. 393; *Bates v. Gillett*, 132 Ill. 287, 24 N. E. 611; *Lich v. Lich*, 158 Mo. App. 400, 138 S. W. 558; *Romjue v. Randolph*, 166 Mo. App. 87, 148 S. W. 185.

The word "family" is not a technical word. It is of flexible meaning, which is to be determined from the context and the subject mat-

⁷⁵ *Dugans v. Livingston*, 15 Mo. 230; *Smith v. Sweringen*, 26 Mo. 551; *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288; *Garth v. Garth*, 139 Mo. 465, 41 S. W. 238; *Wendler v. Lambeth*, 163 Mo. 428, 63 S. W. 684; *Van Pretres v. Cole*, 73 Mo. 39.

Tenth: A will should be construed to give effect to all the words therein without rejecting or controlling any of them, provided this can be done by a reasonable construction not inconsistent with the manifest intent of the testator.⁷⁶ Where plainly required by the ob-

ter to which it relates and depends upon the particular circumstances of the case. In common parlance it imports those who live under the same roof with the paterfamilias. Those who branch out and become members of new establishments cease to be part of the father's family in the common meaning of the word. The word may import parents with their children, whether living together or not or the offspring of a common progenitor if such intention is manifested from the context. *Estate of Bennett*, 134 Cal. 320, 66 Pac. 370; *Wood v. Wood*, 63 Conn. 324, 28 Atl. 520; *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219.

"Family" may mean not a household gathered around a parent, but a stock of descent. *Hoadly v. Wood*, 71 Conn. 452, 42 Atl. 263.

"Heirs of Womersley family." "Family" does not include widow of deceased brother. *Estate of Womersley*, 164 Cal. 85, 127 Pac. 645.

Unaided by context, "his family" should be construed "his children." *Moredock v. Moredock* (C. C.) 179 Fed. 163; *Paul v. Ball*, 31 Tex. 10.

A widow is rarely included in the term "family." *Hoadly v. Wood*, 71 Conn. 452, 42 Atl. 263.

But may be included. *Farnam v. Farnam*, 83 Conn. 369, 77 Atl. 70; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302.

"Nephews and nieces" may include grandnephews and grandnieces. *Shepard v. Shepard*, 57 Conn. 29, 17 Atl. 173.

"Brother" may include half-brother. *Seery v. Fitzpatrick*, 79 Conn.

⁷⁶*Carter v. Alexander*, 71 Mo. 585; *Mersman v. Mersman*, 136 Mo. 244, 37 S. W. 909; *John II Estate v. Brown*, 201 Fed. 224, 119 C. C. A. 458; *In re Estate of Creighton*, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; *Fisher v. Fisher*, 80 Neb. 145, 113 N. W. 1004; *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047.

Substitution of words refused. *Board of Trustees v. May*, 201 Mo. 360, 99 S. W. 1093.

vicious meaning of the will, words may be supplied,⁷⁷ or altered,⁷⁸ transposed,⁷⁹ or omitted.⁸⁰ So punctuation may aid in construction.⁸¹

562, 65 Atl. 964, 9 Ann. Cas. 139; *Watkins v. Blount*, 43 Tex. Civ. App. 460, 94 S. W. 1116.

The word "relation" prima facie includes only relatives by blood and not by affinity. *Holts' Estate*, 146 Cal. 77, 79 Pac. 585.

The words "legal representatives" or "personal representatives" are rarely used by testators in the strict sense of executors and administrators, but usually denote persons beneficially entitled. *Greene v. Huntington*, 73 Conn. 106, 46 Atl. 883; *Marsh v. Marsh*, 92 Neb. 189, 137 N. W. 1122.

The meaning is controlled by the context. *Lepard v. Clapp*, 80 Conn. 29, 66 Atl. 780.

By "legal representatives" the testator may mean children or lineal

⁷⁷ *Cooper v. Cooper*, 7 Houst. (Del.) 488, 31 Atl. 1043; *Nichols v. Boswell*, 103 Mo. 151, 15 S. W. 343; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128; *White v. McCracken*, 87 Mo. App. 262; *Sharp v. Sharp*, 35 Ala. 574; *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *Stratton's Estate*, 112 Cal. 513, 44 Pac. 1028; *Couch v. Gorham*, 1 Conn. 39; *Kellogg v. Mix*, 37 Conn. 247; *West v. Randle*, 79 Ga. 28, 3 S. E. 454; *Cleland v. Waters*, 16 Ga. 496; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481; *Estate of Goetz*, 13 Cal. App. 292, 109 Pac. 492.

⁷⁸ *Cruit v. Owen*, 203 U. S. 368, 27 Sup. Ct. 71, 51 L. Ed. 227; *Guesnard v. Guesnard*, 173 Ala. 250, 55 South. 524; *Waddell v. Waddell*, 99 Mo. 345, 12 S. W. 349, 17 Am. St. Rep. 575; *Briant v. Garrison*, 150 Mo. 655, 52 S. W. 361; *Cox v. Britt*, 22 Ark. 567; *Phelps v. Bates* 54 Conn. 11, 5 Atl. 301, 1 Am. St. Rep. 92.

⁷⁹ *Ro Bards v. Brown*, 167 Mo. 447, 67 S. W. 245; *White v. Rukes* (C. C.) 37 Fed. 754; *In re Stratton*, 112 Cal. 513, 44 Pac. 1028; *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346.

⁸⁰ *Weatherhead v. Baskerville*, 11 How. 329, 13 L. Ed. 717; *Graves v. Northrop*, 18 Conn. 333; *Gaines v. Fender*, 57 Mo. 346; *Bacon v. Nichols*, 47 Colo. 31, 105 Pac. 1082; *Wood's Estate*, 36 Cal. 75; *Marrion v. Williams*, 20 D. C. 20; *Merritt v. Brantley*, 8 Fla. 226.

⁸¹ *Lycan v. Miller*, 112 Mo. 548, 20 S. W. 36, 700; *Zimmerman v. Mechanics' Svc. Bank*, 75 Conn. 645, 54 Atl. 1120; *Healy v. Healy*, 70 Conn. 467, 39 Atl. 793.

Mistakes of spelling, grammar, punctuation or construction may be corrected.⁸²

Eleventh: General words are strengthened by exception and weakened by enumeration.⁸³

Twelfth: A word or a phrase occurring more than once in a will is presumed always to be used in the same sense unless the context shows a different meaning.⁸⁴

descendants. *Staples v. Lewis*, 71 Conn. 288, 41 Atl. 815; *Miller v. Metcalf*, 77 Conn. 176, 58 Atl. 743.

Or may mean heirs at law. *Hartford Tr. Co. v. Wolcott*, 85 Conn. 134, 81 Atl. 1057; *Estate of Riesenbergh*, 116 Mo. App. 308, 90 S. W. 1170.

"Personal representatives" means next of kin and does not include widow. *Davies v. Davies*, 55 Conn. 319, 11 Atl. 500.

But may include widow if she would take under the statute of distributions. *Farnam v. Farnam*, 83 Conn. 369, 77 Atl. 70.

The word "legacy" properly is applied only to dispositions of personal estate, and the word "devise" to real estate, but the context

⁸² *Wood's Estate*, 36 Cal. 81; *Rosenberg v. Frank*, 58 Cal. 387; *Mitchell v. Donohue*, 100 Cal. 202, 34 Pac. 614, 38 Am. St. Rep. 279; *Perry v. Buckley*, 82 Conn. 158, 72 Atl. 1014; *West v. Randle*, 79 Ga. 28, 3 S. E. 454; *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87.

⁸³ *Smith v. Hutchinson*, 61 Mo. 83; *Given v. Hilton*, 95 U. S. 591-598, 24 L. Ed. 458; *Jackson v. Vanderspreigles*, 2 Dall. (Pa.) 142, 1 L. Ed. 323; *Bromberg v. McArdle*, 172 Ala. 270, 55 South. 805, Ann. Cas. 1913D, 855; *Wheeler v. Brewster*, 68 Conn. 177, 36 Atl. 32; *West v. Randle*, 79 Ga. 28, 3 S. E. 454; *Welman v. Neufville*, 75 Ga. 124; *Vaughn v. Howard*, 75 Ga. 285; *Bruton v. Wooten*, 15 Ga. 570; *Perea v. Barela*, 5 N. M. 458-473, 23 Pac. 766; *Weller v. Weller*, 22 Tex. Civ. App. 247, 54 S. W. 652.

⁸⁴ *Estate of Vogt*, 154 Cal. 508, 98 Pac. 265; *Turner v. Balfour*, 62 Conn. 89, 25 Atl. 448; *Wood v. Wood*, 63 Conn. 324, 28 Atl. 520; *Pease v. Cornell*, 84 Conn. 391, 80 Atl. 86; *Ryder v. Lyon*, 85 Conn. 245, 82 Atl. 573; *Estate of Goetz*, 13 Cal. App. 266, 109 Pac. 105; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412.

§ 113. Extrinsic evidence—Latent and patent ambiguities

Thirteenth: The intention of the testator to be sought is not that which merely exists in his mind, but that which is expressed in the language of his will.⁸⁵

A will falls within the rule that parol evidence is not admissible to vary, alter or control the terms of

may show that they were used interchangeably. *Burwell v. Cawood*, 2 How. 560-578, 11 L. Ed. 378; *Logan v. Logan*, 11 Colo. 44, 17 Pac. 99; *Estate of Henderson*, 161 Cal. 353, 119 Pac. 496; *Pfuelb's Estate*, Myr. Prob. (Cal.) 38; *In re Campbell*, 27 Utah, 361, 75 Pac. 851; *Estate of Goetz*, 13 Cal. App. 292, 109 Pac. 492.

Words which in terms describe personal property cannot be extended by implication to real estate, because no disposition is made of the realty. *Paton v. Robinson*, 81 Conn. 547, 71 Atl. 730.

"Worldly goods." *Farish v. Cook*, 78 Mo. 213, 47 Am. Rep. 107; *Bowlin v. Furman*, 34 Mo. 39.

Some common words have been held to embrace both real and personal assets:

"Property." *White v. Keller*, 68 Fed. 796, 15 C. C. A. 683; *Young v. Norris Peters Co.*, 27 App. D. C. 140; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692; *Hicks v. Webb*, 127 Ga. 170, 56 S. E. 307.

"Estate." *Pope v. Pickett*, 65 Ala. 487; *Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33; *Shumate v. Bailey*, 110 Mo. 411, 20 S. W. 178;

⁸⁵ *Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *Platt v. Brannan*, 34 Colo. 125, 81 Pac. 755, 114 Am. St. Rep. 147; *Bishop v. Howarth*, 59 Conn. 455, 22 Atl. 432; *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22; *Alexander v. Bates*, 127 Ala. 328, 28 South. 415; *In re Walkerly*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106.

The intent of the testator must be ascertained from the meaning of the words in the instrument and from those words alone; but extrinsic evidence is admissible to enable the court to discover the meaning attached by the testator to the words used in the will. *Hunt v. White*, 24 Tex. 643.

a written instrument.⁸⁶ Where the terms of a will are plain, they cannot be varied or explained by parol evidence showing an intention on the part of the tes-

Von Phul v. Hay, 122 Mo. 300, 26 S. W. 965; Park v. Fogarty, 134 Ga. 861, 68 S. E. 699; Thornton v. Burch, 20 Ga. 791.

"Money." Miller's Estate, 48 Cal. 165, 17 Am. Rep. 422; Hamilton v. Serra, 17 D. C. 168; Paul v. Ball, 31 Tex. 10.

"Personal effects." Galloway v. Galloway, 32 App. D. C. 76; Perea v. Barela, 5 N. M. 458, 23 Pac. 766.

"Moveable property" seems to apply to choses in possession and not to choses in action. Strong v. White, 19 Conn. 245-248.

"Go to" may be equivalent to give, devise or bequeath. Speckart v. Schmidt, 190 Fed. 499, 111 C. C. A. 331.

"Control" does not imply the power of disposition but only the use and enjoyment. Rosenau v. Childress, 111 Ala. 214, 20 South. 95.

The words "I will that" implies a command. McRee v. Means, 34 Ala. 365.

"Residue" means after payment to charges, debts and particular bequests. Phelps v. Robbins, 40 Conn. 250.

"Books and papers." Jeffrey's Estate, 1 Cal. App. 524, 82 Pac. 549.

"Lend" may mean a life estate. Britt v. Rawlings, 87 Ga. 146, 13 S. E. 336; Booth v. Terrell, 16 Ga. 20.

Or may mean "give" or "devise." Holt v. Pickett, 111 Ala. 362, 20 South. 432; Bryan v. Duncan, 11 Ga. 67; Jones v. Jones, 20 Ga. 699; Pournell v. Harris, 29 Ga. 736.

"Paid" may mean given. Singer v. Taylor, 90 Kan. 285, 133 Pac. 841.

"Maturity" held to mean puberty. Robertson v. Johnston, 24 Ga. 102.

"Wound up" does not necessarily mean the legal closing of the es-

⁸⁶ Estate of Young, 123 Cal. 337, 55 Pac. 1011; Krechter v. Grofe, 166 Mo. 385, 66 S. W. 358; Robinson v. Randolph, 21 Fla. 629, 58 Am. Rep. 692; Vickery v. Hobbs, 21 Tex. 570, 73 Am. Dec. 238.

A trust not sufficiently declared on the face of the will cannot be set up by extrinsic evidence to defeat the rights of the heirs at law. Heidenheimer v. Bauman, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29.

tator at variance with that expressed in the will.⁸⁷ Therefore, the intentions of the testator cannot be

tate, but the actual distribution. *Kosminsky v. Estes*, 27 Tex. Civ. App. 69, 65 S. W. 1108.

Construction of word "between." *Lockwood's Appeal*, 55 Conn. 157, 10 Atl. 517.

"Prorata." *Rosenberg v. Frank*, 58 Cal. 387.

"Credits." *Brandon v. Yeakle*, 66 Ark. 377, 50 S. W. 1004.

"Certificates." *Edmondson v. Bloomshire*, 11 Wall. 382, 20 L. Ed. 44.

"Notes." *Waterman v. Alden*, 143 U. S. 196, 12 Sup. Ct. 435, 36 L. Ed. 123.

"Land." *Watson v. Watson*, 110 Mo. 164, 19 S. W. 543; *Woolverton v. Johnson*, 69 Kan. 708, 77 Pac. 559.

Growing grain does not pass by a bequest of all the testator's personal estate. *Kinsman v. Kinsman*, 1 Root (Conn.) 180, 1 Am. Dec. 37.

⁸⁷ *Erwin v. Smith*, 95 Ga. 699, 22 S. E. 712; *Gillespie v. Shuman*, 62 Ga. 252; *Carson v. Searcy*, 66 Ga. 550; *McNeil v. Hammond*, 87 Ga. 618, 13 S. E. 640; *Kaiser v. Brandenburg*, 16 App. D. C. 310; *Brown v. Tuschoff*, 235 Mo. 449, 138 S. W. 497; *Atwood v. Geiger*, 69 Ga. 498; *Travers v. Reinhardt*, 25 App. D. C. 567; *West v. Randle*, 79 Ga. 28, 3 S. E. 454; *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29; *Bishop v. Howarth*, 59 Conn. 455, 22 Atl. 432; *Holt's Estate*, 146 Cal. 77, 79 Pac. 585; *Hurst v. Von de Veld*, 158 Mo. 239, 58 S. W. 1056; *Lehnhoff v. Theine*, 184 Mo. 346, 83 S. W. 469; *Mersman v. Mersman*, 136 Mo. 256, 37 S. W. 909; *Bradley v. Bradley*, 24 Mo. 311; *Gregory v. Cowgill*, 19 Mo. 415. But see *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128; *Chapman v. Allen*, 56 Conn. 167, 14 Atl. 780; *Canfield v. Bostwick*, 21 Conn. 553; *Spalding v. Huntington*, 1 Day (Conn.) 10; *Waterman v. Canal Louisiana Bank*, 186 Fed. 71, 108 C. C. A. 183; *Bulkeley v. Worthington Ecc. Soc.*, 78 Conn. 526, 63 Atl. 351, 12 L. R. A. (N. S.) 785; *Dickerman v. Alling*, 83 Conn. 342, 76 Atl. 362.

Intention cannot be shown by parol. *Foscue v. Lyon*, 55 Ala. 440; *Lee v. Shivers*, 70 Ala. 288; *Simmons v. Simmons*, 73 Ala. 235; *Mackie v. Story*, 93 U. S. 589, 23 L. Ed. 986; *Weatherhead v. Baskerville*, 11 How. 329, 13 L. Ed. 717; *Canfield v. Bostwick*, 21 Conn. 550; *Hearn v. Ross*, 4 Har. (Del.) 46; *Cochran v. Hudson*, 110 Ga. 762, 36 S. E. 71; *Doyal v. Smith*, 28 Ga. 262; *Paul v. Ball*, 31 Tex. 10.

shown by evidence of his declarations,⁸⁸ nor by the testimony of the draftsman of the will as to what was intended to be expressed,⁸⁹ nor have the courts power to reform the will to conform to the supposed intentions of the testator.⁹⁰

Fourteenth: A latent ambiguity may be explained by parol, but a patent ambiguity may not be.

This is a familiar exception to the general rule excluding parol evidence in the construction of written instruments. A patent ambiguity is one appearing upon the face of the instrument itself. Where such an ambiguity appears, it cannot be aided by a resort to parol evidence; the will must be construed if possible, just as it is written.

A patent ambiguity cannot be explained by parol, as this would be to allow the witnesses to make the will by telling what the testator intended.⁹¹

⁸⁸ Nor by declaration of testator. *Udike v. Mace* (C. C.) 194 Fed. 1001; *McAleer v. Schneider*, 2 App. D. C. 461; *Carson v. Hickman*, 4 *Houst. (Del.)* 328; *Crosson v. Dwyer*, 9 *Tex. Civ. App.* 482, 30 *S. W.* 929.

⁸⁹ Nor by testimony of draftsman. *Robinson v. Bishop*, 23 *Ark.* 378; *Elder v. Ogletree*, 36 *Ga.* 64-71; *Hill v. Felton*, 47 *Ga.* 455, 15 *Am. Rep.* 643.

⁹⁰ The court has no power to reform a will so as to conform to the intentions of the testator, shown by external evidence to be different from those expressed in the instrument. *Holmes v. Campbell College*, 87 *Kan.* 597, 125 *Pac.* 25, 41 *L. R. A. (N. S.)* 1126, *Ann. Cas.* 1914A, 475; *Willis v. Jenkins*, 30 *Ga.* 167; *Board of Trustees v. May*, 201 *Mo.* 360, 99 *S. W.* 1093.

⁹¹ *Ro Bards v. Brown*, 167 *Mo.* 457; 67 *S. W.* 245; *Webb v. Hayden*, 166 *Mo.* 46, 65 *S. W.* 760; *Zirkle v. Leonard*, 61 *Kan.* 636, 60 *Pac.* 318; *Colville v. Trust Co.*, 10 *App. D. C.* 56-72.

Under Georgia code, ambiguities in a will, both latent and patent,

If no meaning can be found for the provisions then they must fail of effect.⁹²

A latent ambiguity, on the other hand, is where the instrument is plain and apparently intelligible upon its face, but when applied to existing circumstances there is really an uncertainty as to which of two or more persons or objects are meant, or the exact nature and extent of the gift. Under these circumstances, the rule has been stated as follows:

One of the undoubted rules as to the admission of extrinsic evidence in the interpretation of wills is this: that for the purpose of determining the object of the testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may enquire into every material fact relating to the person who claims to be interested under the will, and the property which is claimed as the subject of the disposition, and to the circumstances of the testator, and of his family and affairs for the purpose of enabling it to identify the person or thing intended by the testator or to determine the quantity of interest he has given by his will.⁹³

may be explained by parol. *Oliver v. Henderson*, 121 Ga. 836-838, 49 S. E. 743, 104 Am. St. Rep. 185.

⁹² *Young's Estate*, 123 Cal. 337, 55 Pac. 1011; *Heath v. Bancroft*, 49 Conn. 220-222; *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534; *Armistead v. Armistead*, 32 Ga. 597; *Colbert v. Speer*, 24 App. D. C. 187.

⁹³ *Nichols v. Boswell*, 103 Mo. 151, 15 S. W. 343; *Noe v. Kern*, 93 Mo. 367, 6 S. W. 239, 3 Am. St. Rep. 544; *Suydam v. Thayer*, 94 Mo. 55, 6 S. W. 502; *Reinders v. Koppelman*, 94 Mo. 338, 7 S. W. 288; *Landis v. Eppstein*, 82 Mo. 99; *Rothwell v. Jamison*, 147 Mo. 601, 49 S. W. 503; *Clotilde v. Lutz*, 157 Mo. 439, 57 S. W. 1018, 50 L. R. A. 847; *Webb v. Hayden*, 166 Mo. 39, 65 S. W. 760; *Watson v. Watson*, 110 Mo. 170, 19 S. W. 543; *Small v. Field*, 102 Mo. 104, 14 S. W. 815; *Garth v. Garth*, 139 Mo. 456, 41 S. W. 238; *Hurst v. Von de Veld*, 158 Mo. 239, 58 S. W. 1056; *Roberts v. Crume*, 173 Mo. 572, 73 S. W. 662; *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527; *Smith v. Holden*, 58 Kan.

A latent ambiguity, in a will which may be removed by extrinsic evidence, may arise: (1) Either when it names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer such name or description; or (2) when the will contains a misdescription of the object or subject, as where there is no such person or thing in existence; or if in existence, the person is not the one intended, or the thing does not belong to the testator.⁹⁴

535, 50 Pac. 447; *Donohue v. Donohue*, 54 Kan. 136, 37 Pac. 998; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302; *Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468; *Riggs v. Myers*, 20 Mo. 239; *Creasy v. Alverson*, 43 Mo. 13; *Wilkins v. Allen*, 18 How. 385, 15 L. Ed. 396; *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734; *Speer v. Colbert*, 200 U. S. 130, 26 Sup. Ct. 201, 50 L. Ed. 403; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Atkinson v. Cummins*, 9 How. 479, 13 L. Ed. 223; *Callaghan's Estate*, 119 Cal. 575, 51 Pac. 860, 39 L. R. A. 689; *Ayres v. Weed*, 16 Conn. 302; *Brainerd v. Cowdrey*, 16 Conn. 1; *Spencer v. Higgins*, 22 Conn. 527; *Woodruff v. Migeon*, 46 Conn. 237; *Avery v. Chappel*, 6 Conn. 275, 16 Am. Dec. 53; *Greene v. Dennis*, 6 Conn. 299, 16 Am. Dec. 58; *Doyal v. Smith*, 31 Ga. 198; *Jenkins v. Merritt*, 17 Fla. 304; *Burge v. Hamilton*, 72 Ga. 568; *St. James O. A. v. Shelby*, 75 Neb. 591, 106 N. W. 604.

⁹⁴ *Patch v. White*, 117 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860; *Bonds' Appeal*, 31 Conn. 183-190; *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166.

The court may look beyond the face of the will to explain an ambiguity as to the person or property to which it applies, but never for the purpose of enlarging or diminishing the estate devised. *King v. Ackerman*, 2 Black, 408, 17 L. Ed. 292; *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166.

Parol evidence to correct ambiguity in the description of land. *Stackhouse v. Stackhouse*, 2 Dall. 80, 1 L. Ed. 298; *Simmons v. Simmons*, 73 Ala. 235; *Vandiver v. Vandiver*, 115 Ala. 328, 22 South. 158; *Nichols v. Lewis*, 15 Conn. 137; *McAleer v. Schneider*, 2 App. D. C. 461; *Flannery v. Hightower*, 97 Ga. 592, 25 S. E. 371; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451; *Albury v. Albury*, 63 Fla. 329, 58 South. 190; *McElrath v. Haley*, 48 Ga. 641; *Board of Trustees v. May*, 201 Mo. 360, 99 S. W. 1093; *Myher v. Myher*, 224 Mo. 631, 123 S. W. 806; *Cummins v. Riordon*, 84 Kan. 791, 115 Pac. 568; *McMahan*

Fifteenth: A will must be read in the light of the circumstances of the testator and the facts that were within his knowledge when he executed it.

Some courts regard this rule as an amplification merely of the general exception permitting extrinsic evidence to explain latent ambiguities. It embraces

v. Hubbard, 217 Mo. 624, 118 S. W. 481; *Heywood v. Heywood*, 92 Neb. 72, 137 N. W. 984; *Byrn v. Kleas*, 15 Tex. Civ. App. 205, 39 S. W. 980; *Haney v. Gartin*, 51 Tex. Civ. App. 577, 113 S. W. 166; *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203, 79 S. W. 831; *Pemberton v. Perrin*, 94 Neb. 718, 144 N. W. 164.

It is not admissible by extrinsic evidence to substitute a totally different description of land for that in the will. *Patch v. White*, 12 D. C. 468.

Where a devise particularly describes a tract of land that the testator did not own, it cannot by extrinsic evidence be made to apply to a different tract of land that the testator did own.

Where the will is entirely devoid of any general description which can be identified by extrinsic evidence, and the rejection of the false terms of description leaves the description not merely imperfect but hopelessly uncertain, it is wholly void. *Estate of Lynch*, 142 Cal. 373, 75 Pac. 1086.

Or the misdescription of a legatee. *Powell v. Biddle*, 2 Dall. 70, 1 L. Ed. 293; *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952; *In re Case-ment*, 78 Cal. 136, 20 Pac. 362; *Dominici's Estate*, 7 Cal. Unrep. Cas. 289, 87 Pac. 389; *In re Gibson*, 75 Cal. 329, 17 Pac. 438; *Pearson's Estate*, 113 Cal. 577, 45 Pac. 849, 1062; *Id.*, 125 Cal. 285, 57 Pac. 1015; *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351; *Estate of Dominici*, 151 Cal. 181, 90 Pac. 448; *Estate of Gruendike*, 154 Cal. 628, 98 Pac. 1057; *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537; *Doughten v. Vandever*, 5 Del. Ch. 51; *Cheney v. Selman*, 71 Ga. 384; *Seebrock v. Fedawa*, 33 Neb. 413, 50 N. W. 270, 29 Am. St. Rep. 488; *Second U. P. Ch. v. First U. P. Ch.*, 71 Neb. 563, 99 N. W. 252; *Pemberton v. Perrin*, 94 Neb. 718, 144 N. W. 164; *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166.

In resolving a latent ambiguity there is no rule of construction which prefers a name to a description. *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166.

more than that. Every will is a special law of descents and distributions applying to a concrete set of facts and circumstances. Those facts and circumstances were in the mind of the testator at the time he executed the will. The court, therefore, in order to construe the will in a natural and proper manner must place itself as nearly as possible in the situation of the testator and read the will in the light of his circumstances.⁹⁵ This is a broader proposition than the so-

⁹⁵ *Hawes v. Foote*, 64 Tex. 22; *Lenz v. Sens*, 27 Tex. Civ. App. 442, 66 S. W. 110; *Cleveland v. Cleveland*, 89 Tex. 445, 35 S. W. 145; *Hunt v. White*, 24 Tex. 643; *Howze v. Howze*, 19 Tex. 553; *Griffith v. Witten*, 252 Mo. 627, 161 S. W. 708; *Heywood v. Heywood*, 92 Neb. 72, 137 N. W. 984; *In re Poppleton's Estate*, 34 Utah, 285, 97 Pac. 138, 131 Am. St. Rep. 842; *Canfield v. Canfield*, 118 Fed. 1, 55 C. C. A. 169; *Garrett v. Wheelless*, 69 Ga. 466; *Morgan v. Huggins* (C. C.) 42 Fed. 869, 9 L. R. A. 540; *Simons' Will*, 55 Conn. 239, 11 Atl. 36; *Mansfield v. Mix*, 71 Conn. 72, 40 Atl. 915; *Scoville v. Mason*, 76 Conn. 459, 57 Atl. 114; *Fritsche v. Fritsche*, 75 Conn. 285, 287, 53 Atl. 585; *Langdon's Estate*, 129 Cal. 451, 62 Pac. 73; *Estate of Tompkins*, 132 Cal. 173, 64 Pac. 268; *Estate of Marti*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; *Kauffman v. Gries*, 141 Cal. 295-299, 74 Pac. 846; *Estate of Painter*, 150 Cal. 498, 89 Pac. 98, 11 Ann. Cas. 760; *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371; *Bishop v. Howarth*, 59 Conn. 455, 22 Atl. 432; *Cruit v. Owen*, 25 App. D. C. 514; *Ferry v. Langley*, 12 D. C. 140; *Tebow v. Dougherty*, 205 Mo. 315, 103 S. W. 985; *Tisdale v. Prather*, 210 Mo. 402-408, 109 S. W. 41; *Stewart v. Jones*, 219 Mo. 614, 118 S. W. 1, 131 Am. St. Rep. 595; *Snorgrass v. Thomas*, 166 Mo. App. 603, 150 S. W. 106; *Hurst v. Weaver*, 75 Kan. 758-762, 90 Pac. 297; *Cornet v. Cornet*, 248 Mo. 184, 154 S. W. 121; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524; *McCulloch v. Valentine*, 24 Neb. 215, 38 N. W. 854; *Chick v. Ives*, 2 Neb. Unof. 879, 90 N. W. 751; *Lesiur v. Sipherd*, 84 Neb. 296, 121 N. W. 104; *Little v. Giles*, 25 Neb. 313, 41 N. W. 186; *Currie v. Murphy*, 35 Miss. 473.

Evidence of circumstances cannot vary the terms of a will, but the court may by evidence of extrinsic facts put itself as near as may

lution of a mere latent ambiguity, which may be, and usually is, the identification of a particular devisee from among two or more that may seem to fall within the description or the identification of the property which is the subject of the gift. Under the rule which we are now discussing the entire scheme of the will and its various related parts may come under review. So natural and universal is it that most courts act upon it without comment. The proof follows the pleadings in the suit to construe, which begin by setting out the circumstances and relations of the parties and the condition of the property. The federal court has stated the rule broadly thus:

Formerly, we might now say, anciently, it was the rule that the law should fix the meaning of the will and of other written documents without reference to the circumstances of the testator or makers of the document. The history of the evolution of the law resulting in the modern rule is well stated in 4 Wigmore on Evidence, § 2470. The rule now is unquestioned that extrinsic evidence in aid of the interpretation of wills is admissible for the purpose of showing the object of the testator's bounty, the property devised, and the quantity of interest intended to be given. Evidence may be received as to every material fact relating to the person who claims under the will, and to the property devised, as to the circumstances of the testator and his family and affairs, so as to lead to a correct decision of the quantity of interest the claimant is entitled to by the will. This is true as to every material point

be in the condition of the testator in respect to his property and the situation of his family for the purpose of rightly understanding the meaning of the words of his will. *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235; *Peet v. Ry.*, 70 Tex. 522, 8 S. W. 203.

respecting which it can be shown that a knowledge of extrinsic facts can aid in the right interpretation of the will.⁹⁶

Upon the same principle the court must assume that the language in the will was used with reference to the facts within the knowledge of the testator when he executed the will,⁹⁷ although intended to be prospective in its operation and take effect at his death.⁹⁸ Thus a gift to one who will do a certain thing cannot apply to one who has done the thing before the execution of the will.⁹⁹ Nor can the meaning of the testator's words be changed by subsequent events.¹ The future course of events may affect the operation of a will but never its construction.² The question is what were the events within the contemplation of the

⁹⁶ *Northrop v. Columbian Lumber Co.*, 186 Fed. 770, 108 C. C. A. 640; *Atkins v. Best*, 27 App. D. C. 148; *Olmstead v. Dunn*, 72 Ga. 850; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481; *Whitelaw v. Rodney*, 212 Mo. 540, 111 S. W. 560; *Albert v. Sanford*, 201 Mo. 117-127, 99 S. W. 1068; *Board of Trustees v. May*, 201 Mo. 360-369, 99 S. W. 1093; *Crumley v. Scales*, 135 Ga. 300-306, 69 S. E. 531; *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. 695; *Georgia C. & N. Ry. v. Archer*, 87 Ga. 237, 13 S. E. 636; *Hamilton v. Serra*, 17 D. C. 168; *Am. Sec. & Tr. Co. v. Payne*, 33 App. D. C. 178; *Billingslea v. Moore*, 14 Ga. 370.

⁹⁷ *In re Pearsons*, 99 Cal. 30, 33 Pac. 751; *Adams v. Spalding*, 12 Conn. 358; *Grou v. Brinley*, 35 Conn. 109; *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *White v. Holland*, 92 Ga. 216, 18 S. E. 17, 44 Am. St. Rep. 87; *Jacobs v. Button*, 79 Conn. 360, 65 Atl. 150; *Johnson v. White*, 76 Kan. 159, 90 Pac. 810; *Michon v. Ayalla*, 84 Tex. 685, 19 S. W. 878; *Pearce v. Pearce*, 104 Tex. 73, 134 S. W. 210.

⁹⁸ *Canfield v. Bostwick*, 21 Conn. 553; *Gold v. Judson*, 21 Conn. 622; *Simmons v. Hubbard*, 50 Conn. 576; *Coit v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29.

⁹⁹ *Shepard v. Shepard*, 57 Conn. 29, 17 Atl. 173.

¹ *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22.

² *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33.

testator at the time he expected it to take effect, not what he might have done if he had foreseen the real course of events.³

A codicil is regarded as a republication of the will and brings the will down to its date as to the facts within the knowledge of the testator.⁴

Sixteenth: The construction of a will which is free from ambiguity is purely a question of law for the court. Where extrinsic evidence is properly admissible the determination of conflicting facts is a question of fact but the construction after the facts are found is still a question of law.⁵

³ *King v. Mitchell*, 8 Pet. 326-349, 8 L. Ed. 962; *Blakeney v. Du Bose*, 167 Ala. 627, 52 South. 746.

Courts cannot conjecture what the testator would have done had he anticipated the contingency which had afterward arisen. *Gray v. Corbit*, 4 Del. Ch. 135.

⁴ *Beardsley's Appeal*, 77 Conn. 705, 60 Atl. 664; *Whiting's Appeal*, 67 Conn. 379, 35 Atl. 268; *Estate of McCauley*, 138 Cal. 432, 71 Pac. 512; *Smith v. Day*, 2 Pennewill (Del.) 245, 45 Atl. 396; *Jones v. Shewmake*, 35 Ga. 151; *Whitlock v. Vaun*, 38 Ga. 562; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391; *Cliett v. Cliett*, 1 Posey, Unrep. Cas. (Tex.) 407; *Pardee v. Kuster*, 15 Wyo. 368, 89 Pac. 572, 91 Pac. 836.

An unattested codicil cannot be resorted to to aid the construction of the will. *Crenshaw v. McCormick*, 19 App. D. C. 494.

⁵ *Estate of Donnellan*, 164 Cal. 14, 127 Pac. 166; *Moss v. Helsley*, 60 Tex. 426-437.

§ 114. Construction as affected by the general law of descents and distributions

Seventeenth: A will being made for the express purpose of altering pro tanto only the general law of descents and dispositions, it is construed in harmony with that law on all doubtful points.⁶

When a reference to heirs or representatives is ambiguous the Statute of Descents and Distributions is to be taken as a guide and the rules of inheritance followed.⁷ The heir is a natural favorite of the law,

⁶ *Horsey v. Horsey's Ex'r*, 1 *Houst. (Del.)* 438; *Snyder v. Baker*, 16 *D. C.* 443; *Paul v. Ball*, 31 *Tex.* 10; *Estate of Goetz*, 13 *Cal. App.* 292, 109 *Pac.* 492; *In re Estate of Hansen*, 87 *Neb.* 567, 127 *N. W.* 879; *Clift v. Wade*, 51 *Tex.* 14.

"There is no presumption of survivorship in the case of those who perish by a common disaster, in the absence of proof tending to show the order in which dissolution took place; and actual survivorship being unascertainable, descent and distribution take the same course as if the deaths had been simultaneous." *Young Women's Christian Home v. French*, 187 *U. S.* 401, 23 *Sup. Ct.* 184, 47 *L. Ed.* 233; *Faul v. Hulick*, 18 *App. D. C.* 9; *Sanders v. Simcich*, 65 *Cal.* 51, 2 *Pac.* 741.

A legally established will becomes the law of descent and distribution governing the particular estate unless it contravenes some rule of law or of public policy. *Jordan v. Thompson*, 67 *Ala.* 469; *Olinstead v. Dunn*, 72 *Ga.* 850.

The law presumes that a person proved to be dead left an heir or heirs. No such presumption obtains as to the existence of a will. *Slayton v. Singleton*, 72 *Tex.* 209, 9 *S. W.* 876.

⁷ *Hamilton v. Downs*, 33 *Conn.* 213; *Lyon v. Acker*, 33 *Conn.* 222; *Conklin v. Davis*, 63 *Conn.* 377, 28 *Atl.* 537; *Angus v. Noble*, 73 *Conn.* 56, 46 *Atl.* 278; *Heath v. Bancroft*, 49 *Conn.* 223; *Geery v. Skelding*, 62 *Conn.* 501-503, 27 *Atl.* 77; *Gray v. Corbit*, 4 *Del. Ch.* 357; *Guerard v. Guerard*, 73 *Ga.* 506; *Holcomb v. Wright*, 5 *App. D. C.* 76; *MacLean v. Williams*, 116 *Ga.* 257, 42 *S. E.* 485, 59 *L. R. A.* 125; *Burch v. Burch*, 20 *Ga.* 834.

and a construction will not be preferred that disinherits the heir.⁸

If property is left to the testator's heirs in the same manner and proportion in which they would take were there no will, the rule of law is that they take as heirs and not as purchasers.⁹

⁸ *Whorton v. Moragne*, 62 Ala. 209; *Wolffe v. Loeb*, 98 Ala. 432, 13 South. 744; *Walker v. Parker*, 13 Pet. 166-173, 10 L. Ed. 109; *McCaffrey v. Manogue*, 196 U. S. 563, 25 Sup. Ct. 319, 49 L. Ed. 608; *Blagge v. Balch*, 162 U. S. 439-465, 16 Sup. Ct. 853, 40 L. Ed. 1032; *Bowker v. Bowker*, 148 Mass. 198-203, 19 N. E. 213; *Jackson v. Jackson*, 153 Mass. 374, 26 N. E. 1112, 11 L. R. A. 305, 25 Am. St. Rep. 643; *Low v. Harmony*, 72 N. Y. 408-414; *Wilkins v. Allen*, 18 How. 385, 15 L. Ed. 396; *Smith v. Edrington*, 8 Cranch, 66, 3 L. Ed. 490; *Hughes v. Knowlton*, 37 Conn. 432; *White v. White*, 52 Conn. 521; *Glover v. Stillson*, 56 Conn. 318, 15 Atl. 752; *Peckham v. Lego*, 57 Conn. 559, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130; *Bill v. Payne*, 62 Conn. 141, 25 Atl. 354; *Pendleton v. Larrabee*, 62 Conn. 395, 26 Atl. 482; *Bond's Appeal*, 31 Conn. 190; *Hitch v. Patten*, 8 Houst. (Del.) 334, 16 Atl. 558, 2 L. R. A. 724; *Wright v. Hicks*, 12 Ga. 155, 56 Am. Dec. 451; *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. 695; *McCown v. Owens*, 15 Tex. Civ. App. 346, 40 S. W. 336; *Heilman v. Reitz*, 89 Neb. 422, 131 N. W. 909; *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29.

⁹ *Howard v. Howard*, 19 Conn. 318; *Jost v. Jost*, 12 D. C. 487; *Starr v. Starr*, 2 Root (Conn.) 303-308.

Where the title which the devisees would take by the will is better than they would take by descent they take as devisees and purchasers and not as heirs. *Power v. Davis*, 3 McArthur (10 D. C.) 153; *Landie v. Simms*, 1 App. D. C. 507.

The English rule that a will which leaves the property precisely as the law would leave it is no will, and that the heirs take by descent and not by purchase, is repudiated. *Lucas v. Parsons*, 24 Ga. 640-659, 71 Am. Dec. 147.

§ 115. After acquired property

Eighteenth: The American rule is that a will speaks from the death of the testator both as to real and personal property.

This is the common law rule as to personal property but is mainly a statutory rule as to real property.¹⁰ The right to make a will of lands began with the Statute of Wills, and at that time the idea was firmly fixed in the judicial mind that a will of lands was a conveyance to uses and could only operate upon the exact land under the exact title by which the testator was then seized. This rule is explained in an opinion of the supreme court of the United States:

Under the Statute of Wills a general devise of all the testator's estate would comprehend and include all the personalty to which he was entitled at the time of his death, but would not embrace after acquired land, though such might be the expressed intention of the testator. The reason given for the distinction was that a devise of land was regarded in the same light as a conveyance, and as a conveyance at common law would not vest for want of seizin it was therefore held to be operative only on such real estate as the testator might have at the time of making the will, that is to say, that a devise was in the nature of a conveyance or appointment of real estate then owned to take effect at a future date, and could not therefore operate on future acquisitions.¹¹

¹⁰ *McClaskey v. Barr* (C. C.) 54 Fed. 781; *Morgan v. Huggins* (C. C.) 42 Fed. 869, 9 L. R. A. 540; *Carroll v. Carroll*, 16 How. 275, 14 L. Ed. 936; *Estate of Russell*, 150 Cal. 604, 89 Pac. 345; *McAleer v. Schneider*, 2 App. D. C. 461.

Prior to the statute after acquired lands did not pass by the will. *Atwood v. Beck*, 21 Ala. 590; *Meador v. Sorsby*, 2 Ala. 712, 36 Am. Dec. 432; *Jones v. Shewmake*, 35 Ga. 151.

¹¹ *Hardenbergh v. Ray*, 151 U. S. 112-120, 14 Sup. Ct. 305, 38 L.

Now, by the help of modern statutes the rule is that all of the real estate owned by the testator at his death, regardless of the time of its acquisition or the title by which he may hold it, will pass under any general words in the will that are sufficient to embrace such land.¹² Nothing is gained by holding a will to be a conveyance at the time of its execution. No interest passes until the testator's death.¹³ That is the time when he must have contemplated that all his dispositions would go into effect, and the courts so assume.¹⁴

Ed. 93; *Estate of Hopper*, 66 Cal. 80, 4 Pac. 984; *Brewster v. McCall*, 15 Conn. 274; *Duffel v. Burton*, 4 Har. (Del.) 290; *Gibbon v. Gibbon*, 40 Ga. 562-575.

¹² *Taylor v. Harwell*, 65 Ala. 1; *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Graham v. De Yampert*, 106 Ala. 279, 17 South. 355; *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; *Estate of Dwyer*, 159 Cal. 664, 115 Pac. 235; *Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33; *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *Dickerson's Appeal*, 55 Conn. 230, 10 Atl. 194, 15 Atl. 99. See the very interesting opinion of Judge Leonard in *Liggat v. Hart*, 23 Mo. 127. Also *Applegate v. Smith*, 31 Mo. 169; *Hale v. Audsley*, 122 Mo. 316, 26 S. W. 963; *Mueller v. Buenger*, 184 Mo. 458, 83 S. W. 458, 67 L. R. A. 648, 105 Am. St. Rep. 541; *Durborow v. Durborow*, 67 Kan. 139, 72 Pac. 566; *Johnson v. White*, 76 Kan. 159, 90 Pac. 810; *Cardwell v. Rogers*, 76 Tex. 37, 12 S. W. 1006; *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Henderson v. Ryan*, 27 Tex. 670; *Hamilton v. Flinn*, 21 Tex. 713.

A general residuary devise of all of the testator's estate real and personal, carries after acquired land under the Act of Congress. *Taylor v. Leesnitzer*, 37 App. D. C. 357, overruling *McAleer v. Schneider*, 2 App. D. C. 461; *Bradford v. Matthews*, 9 App. D. C. 438; *Crenshaw v. McCormick*, 19 App. D. C. 494.

¹³ *Cozzens v. Jamison*, 12 Mo. App. 452.

A will does not affect previous conveyances by deed. *Heatley v. Long*, 135 Ga. 153, 68 S. E. 783.

¹⁴ *Webb v. Archibald*, 128 Mo. 299, 34 S. W. 54; *Vitt v. Clark*, 66

§ 116. Presumption against intestacy

Nineteenth: The presumption is that the testator intended to dispose of all the property of which he had a legal right to dispose and not die intestate as to any part of it.¹⁵

Mo. App. 214; *Touart v. Rickert*, 163 Ala. 362, 50 South. 896; *Pierce v. Fulmer*, 165 Ala. 344, 51 South. 728; *Simmons v. Hubbard*, 50 Conn. 574.

¹⁵ *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458; *Kenaday v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339; *Vernon v. Vernon*, 53 N. Y. 351; *Gray v. Noholoa*, 214 U. S. 108, 29 Sup. Ct. 571, 53 L. Ed. 931 (affirming 18 Hawaii, 265); *Hatch v. Ferguson* (C. C.) 57 Fed. 966; *Canfield v. Canfield*, 118 Fed. 1, 55 C. C. A. 169; *McGraw v. McGraw*, 176 Fed. 312, 99 C. C. A. 650; *King v. Ackerman*, 2 Black, 408, 17 L. Ed. 292; *Gregory v. Welch*, 90 Ark. 152, 118 S. W. 404; *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681; *Estate of Young*, 123 Cal. 337, 53 Pac. 1011; *Granniss' Estate*, 142 Cal. 1, 75 Pac. 324; *McClellan v. Weaver*, 4 Cal. App. 593, 88 Pac. 646; *Estate of Lux*, 149 Cal. 200, 85 Pac. 147; *Estate of Koch*, 8 Cal. App. 90, 96 Pac. 100; *Estate of Heberle*, 153 Cal. 275, 95 Pac. 41; *Estate of Gregory*, 12 Cal. App. 309, 107 Pac. 566; *Estate of Blake*, 157 Cal. 448, 108 Pac. 287; *Erwin v. Henry*, 5 Mo. 469; *Dugans v. Livingston*, 15 Mo. 234; *Gaines v. Fender*, 57 Mo. 342; *Van Pretres v. Cole*, 73 Mo. 39; *White v. McCracken*, 87 Mo. App. 268; *Watson v. Watson*, 110 Mo. 171, 19 S. W. 543; *Overton v. Overton*, 131 Mo. 567, 33 S. W. 1; *Hurst v. Von de Veld*, 158 Mo. 239, 58 S. W. 1056; *Ro Bards v. Brown*, 167 Mo. 447, 67 S. W. 245; *Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 468; *Boston S. D. Co. v. Stich*, 61 Kan. 474, 59 Pac. 1082; *State v. Smith*, 52 Conn. 563; *Peckham v. Lego*, 57 Conn. 559, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130; *Warner v. Willard*, 54 Conn. 472, 9 Atl. 136; *Neely v. Phelps*, 63 Conn. 251, 29 Atl. 128; *Belfield v. Booth*, 63 Conn. 305, 27 Atl. 585; *Richardson v. Penicks*, 1 App. D. C. 261; *Marion v. Williams*, 20 D. C. 20; *Kennedy v. Alexander*, 21 App. D. C. 424; *Galloway v. Galloway*, 32 App. D. C. 76; *Burch v. Burch*, 20 Ga. 834; *Johnson v. White*, 76 Kan. 159, 90 Pac. 810; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481; *Givens v. Ott*, 222 Mo. 395, 121 S. W. 23; *Tebow v. Dougherty*, 205 Mo. 315, 103 S.

Where a will may reasonably be interpreted in two ways, one of which results in intestacy while the other leads to an effective testamentary disposition, the interpretation which will prevent intestacy is to be preferred.¹⁶ This rule appears in the statutes of many states.¹⁷ But such presumption cannot change the actual intent of the testator as derived from the language of his will.¹⁸ The courts cannot strain the

W. 985; *McMichael v. Pye*, 75 Ga. 189; *Singer v. Taylor*, 90 Kan. 285, 133 Pac. 841; *Snyder v. Baker*, 16 D. C. 443; *Sanger v. Butler*, 45 Tex. Civ. App. 527, 101 S. W. 459; *Jones v. Hudson*, 93 Neb. 561, 141 N. W. 141, 44 L. R. A. (N. S.) 1182; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524; *Northern Tr. Co. v. Wheaton*, 249 Ill. 606, 94 N. E. 980, 34 L. R. A. (N. S.) 1150; *Griffith v. Witten*, 252 Mo. 627, 161 S. W. 708; *Hinzie v. Hinzie*, 45 Tex. Civ. App. 297, 100 S. W. 803.

The presumption against intestacy is one of construction where the testamentary intent is ascertained and the subject matter only is in doubt. The rule does not apply to the existence of the *animus testandi*. *Estate of Anthony*, 21 Cal. App. 157, 131 Pac. 96.

Nor to testamentary capacity. *Lehnhoff v. Theine*, 184 Mo. 346, 83 S. W. 469.

Surface devised to one and coal devised to another disposes of whole estate. No partial intestacy. *Myher v. Myher*, 224 Mo. 631, 123 S. W. 806.

Unless reserved, standing crops pass with devise. *In re Estate of Andersen*, 83 Neb. 8, 118 N. W. 1108, 131 Am. St. Rep. 613, 17 Ann. Cas. 941; *In re Estate of Pope*, 83 Neb. 723, 120 N. W. 191.

¹⁶ *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371; *Estate of O'Gorman*, 161 Cal. 654, 120 Pac. 33; *Dempsey v. Taylor*, 4 Tex. Civ. App. 126, 23 S. W. 220.

¹⁷ *Barber v. P. Ft. W. & C. R.*, 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925; *Felton v. Hill*, 41 Ga. 554; *Kinthead v. Maxwell*, 75 Kan. 50-54, 88 Pac. 523; *Little v. Giles*, 25 Neb. 313, 41 N. W. 186.

¹⁸ *Johnson v. Holifield*, 82 Ala. 123, 2 South. 753; *Fairs' Estate*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Estate of Murphy*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110; *Johnson v. Stanton*, 30 Conn. 297; *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534;

meaning of the testator's language in order to avoid partial intestacy, and if, after giving the will a fair interpretation, there is property left undisposed of, it goes to the heir at law, or to the next of kin as intestate estate.¹⁹

The presence in the will of a residuary clause is evidence of an intention to avoid partial intestacy,²⁰ but where the residuary clause partially lapses intestacy of that portion is an unavoidable result.²¹

Jackson v. Alsop, 67 Conn. 249, 34 Atl. 1106; *Farish v. Cook*, 78 Mo. 212, 47 Am. Rep. 107; *Id.*, 6 Mo. App. 328; *Colville v. Trust Co.*, 10 App. D. C. 56.

¹⁹ *Wolffe v. Loeb*, 98 Ala. 426, 13 South. 744; *Johnson v. Holifield*, 82 Ala. 123, 2 South. 753; *Estate of Kunkler*, 163 Cal. 797, 127 Pac. 43; *Sheldon v. Rose*, 41 Conn. 371; *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320; *Watson v. Watson*, 110 Mo. 170, 19 S. W. 543; *Hurst v. Von de Veld*, 158 Mo. 247, 58 S. W. 1056; *Peuquet v. Berthold*, 183 Mo. 61, 81 S. W. 874; *Walker v. Williamson*, 25 Ga. 549; *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826; *Howard v. Evans*, 24 App. D. C. 127; *Philleo v. Holliday*, 24 Tex. 38-42; *Haralson v. Redd*, 15 Ga. 148; *Heilman v. Reitz*, 89 Neb. 422, 131 N. W. 909; *Rice v. Saxon*, 28 Neb. 380, 44 N. W. 456.

²⁰ *Hartford Tr. Co. v. Wolcott*, 85 Conn. 134, 81 Atl. 1057; *O'Conner v. Murphy*, 147 Cal. 148, 81 Pac. 406; *Byrne v. Weller*, 61 Ark. 366, 33 S. W. 421; *Young v. Norris Peters Co.*, 27 App. D. C. 140; *Galloway v. Darby*, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782; *Hinz v. Hinz*, 45 Tex. Civ. App. 297, 100 S. W. 803.

²¹ *Estate of Kunkler*, 163 Cal. 797, 127 Pac. 43.

§ 117. Recitals in Wills

It frequently happens that wills contain recitals of facts connected with the testator; his property, its character, extent and the title by which it is held; his family and personal relations and his previous dealings with those within the range of his bounty. These recitals are, of course, evidence of facts within the testator's knowledge at the date of the will and as such have a bearing on its construction.²² They are also evidence as admissions and are binding on the heirs, devisees and those claiming under the will.²³ But they have no probatory force against third persons not claiming under the will.²⁴

²² *Summerhill v. Darrow*, 94 Tex. 74, 57 S. W. 942.

²³ *Box v. Lawrence*, 14 Tex. 545; *Shepherd v. White*, 11 Tex. 346; *White v. Holman*, 25 Tex. Civ. App. 152, 60 S. W. 437.

²⁴ *Manning v. Manning*, 135 Ga. 597-602, 69 S. E. 1126.

Recitals in will may constitute notice of the existence of wife and children to those that claim under the will, but not as to those not claiming under will. *Nelson v. Bridge*, 39 Tex. Civ. App. 283, 87 S. W. 885.

Recitals in a will of gifts made by testator in his lifetime do not constitute a devise by implication. *Estate of Wells*, 7 Cal. App. 515, 94 Pac. 856.

CHAPTER IX

LEGACIES AND DEVICES

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§ 118. Extent of testamentary power

Under the modern rule the testamentary power may be exercised over any property, or any title to or right in property which the testator has except so far as his right to convey by will is legally restricted either by statute or by the nature of his title.

Estates both legal and equitable¹ whether in possession or remainder,² pass by will. But, except under the doctrine of election hereinafter noted, the testator cannot will property that he does not own.³ The devisee takes the same title the testator had, and no greater.⁴ His title is dependent upon the will, and is limited not only by what the testator had power to convey, but also by what the testator actually did convey.⁵

¹ *Meador v. Sorsby*, 2 Ala. 712, 36 Am. Dec. 432; *Mayer v. Am. Sec. & Tr. Co.*, 33 App. D. C. 391.

The power in the holder of an equitable title to dispose of the property by will includes *ex vi termini* any and all modes of disposal competent to be made by will, except so far as the power of appointment by will is qualified or restricted in the instrument creating it. *Papin v. Piednoir*, 205 Mo. 521, 104 S. W. 63.

² *Hemingway v. Hemingway*, 22 Conn. 462; *Puryear v. Beard*, 14 Ala. 121.

³ *Kern v. Stushel*, 156 Mo. App. 13, 135 S. W. 1007.

A full blooded Creek Indian who died before allotment of his lands could not dispose by will of lands subsequently allotted to his heirs. *Coachman v. Sims*, 36 Okl. 536, 129 Pac. 845.

⁴ *Davidson v. Dockery*, 179 Mo. 687, 78 S. W. 624; *Dangerfield v. Williams*, 26 App. D. C. 508; *Darsey v. Darsey*, 131 Ga. 208, 62 S. E. 20.

⁵ *March v. Huyter*, 50 Tex. 243; *Haring v. Shelton*, 103 Tex. 10, 122 S. W. 13.

One whose interest in property depends upon the terms of a will

§ 119. Specific legacies and devises

A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given.⁶

A devise or legacy is said to be "specific" when it definitely describes the subject of the gift; as "my grey mare Nellie," or "Lot 1, Block 2, Smith's Addition to Westport." In such case if the testator, at the time of his death, no longer owns the par-

does not, by deed from the executor purporting to be executed pursuant to the requirements of the will, acquire any greater interest than would pass under the will. *Sanders v. Thompson*, 123 Ga. 4, 50 S. E. 976; *Morris v. Eddins*, 18 Tex. Civ. App. 38, 44 S. W. 203.

⁶ *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; *In re Zeile*, 74 Cal. 125, 15 Pac. 455; *Christian v. Christian*, 3 Port. (Ala.) 350; *Hardy v. Toney*, 20 Ala. 237; *Myers' Ex'rs v. Myers*, 33 Ala. 85; *Maybury v. Grady*, 67 Ala. 147; *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Alexander v. Bates*, 127 Ala. 328, 28 South. 415; *Cooch's Ex'r v. Cooch's Adm'r*, 5 Houst. (Del.) 540, 1 Am. St. Rep. 161; *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636, Ann. Cas. 1913C, 542; *Larned v. Adams*, 1 Hayw. & H. (D. C.) 384, Fed. Cas. No. 8,092; *Brainerd v. Cowdrey*, 16 Conn. 1; *Wash. Asylum v. Wash.*, 7 D. C. 259; *Kaiser v. Brandenburg*, 16 App. D. C. 310; *Young v. McKinnie*, 5 Fla. 542; *Lilly v. Griffin*, 71 Ga. 535; *In re Bouk's Estate*, 80 Misc. Rep. 196, 141 N. Y. Supp. 922; *In re Campbell*, 27 Utah, 361, 75 Pac. 851; *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375; *In re Estate of Bush*, 89 Neb. 334, 131 N. W. 602.

Specific devise distinguished from general. *Estate of Painter*, 150 Cal. 498, 89 Pac. 98, 11 Ann. Cas. 760; *Maybury v. Grady*, 67 Ala. 147.

The question whether a testamentary gift is specific or general is to be determined by the same tests where the subject of the gift is

ticular property described the gift must fail.⁷ The intended legatee or devisee has no resource against the general property of the estate to make good his loss.⁸ A specific gift is confined strictly to the property described and cannot be extended by implication.⁹

Courts are not inclined to favor a specific bequest. If compatible with the language employed, they are disposed to interpret gifts as general or demonstrative legacies.¹⁰

real as where it is personal property. *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375.

Specific bequest distinguished from general. *Estate of Woodworth*, 31 Cal. 595; *Abila v. Burnett*, 33 Cal. 658; *McLeod v. Dell*, 9 Fla. 451; *Jordan v. Miller*, 47 Ga. 346.

A legacy cannot be changed from a general to a specific legacy by parol evidence. *Foscue v. Lyon*, 55 Ala. 440.

Legacy held to be specific and not demonstrative. *Ga. Infirmary v. Jones* (C. C.) 37 Fed. 720.

⁷ *Humphreys v. Humphreys*, 2 Cox, 185; *Ga. Infirmary v. Jones* (C. C.) 37 Fed. 750-752; *Davis v. Crandall*, 101 N. Y. 311, 4 N. E. 721; *Sidebotham v. Watson*, 11 Hare, 170; *Chaworth v. Beech*, 4 Ves. 555; *Ford v. Fleming*, 1 Eq. Cas. Abr. 302; *Fryer v. Morris*, 9 Ves. 360; *Towle v. Swasey*, 106 Mass. 100; *Gilbreath v. Winter*, 10 Ohio, 64; *Moss v. Helsley*, 60 Tex. 426.

⁸ *Waters v. Hatch*, 181 Mo. 262, 79 S. W. 916; *Marshall v. Hartzfelt*, 98 Mo. App. 178, 71 S. W. 1061; *Mo. Baptist Sanitarium v. McCune*, 112 Mo. App. 332, 87 S. W. 93.

⁹ *Webster v. Wiers*, 51 Conn. 569.

No devise of after acquired real estate is specific unless the land is described with particularity to enable the devisee to identify it. *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Maybury v. Grady*, 67 Ala. 147.

At common law a devise of real estate was always specific but under California code it may be general. *Estate of Woodworth*, 31 Cal. 595.

Specific legacy cannot embrace after acquired property or lapsed legacies. *Sinnott v. Kenaday*, 14 App. D. C. 1; *Hawes v. Foote*, 64 Tex. 22-34.

¹⁰ *Nusly v. Curtis*, 36 Colo. 464-467, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134.

§ 120. Demonstrative legacy

A demonstrative legacy partakes of the nature of both a general and a specific legacy: it is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund or to evince an intent to relieve the general estate from liability in case the fund fails.¹¹

As a specific legacy is dependent upon the continued existence and ownership of the specific property and gives the legatee no recourse on the general estate in case the specific property passes out of existence or out of the ownership of the testator the presumption is against a legacy being specific and in favor of its being demonstrative.¹²

The distinction seems to be this: If a legacy be given with reference to a particular fund, only as pointing out a convenient mode of payment, it is considered demonstrative, and the legatee will not be disappointed though the fund totally fails. But when the gift is of a fund itself, in whole or in part, or is so charged upon the object made subject to it as to show an intent to burden that object alone with its payment, it is specific.¹³

¹¹ *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278; *Myers' Ex'r v. Myers*, 33 Ala. 85; *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Hutchinson v. Fuller*, 75 Ga. 88; *Coopland v. Lake*, 9 Tex. Civ. App. 39, 28 S. W. 104.

¹² *Kenaday v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339; *Ga. Infirmary v. Jones* (C. C.) 37 Fed. 750-753; *Gillaume v. Adderley*, 15 Ves. 384; *O'Day v. O'Day*, 193 Mo. 62, 91 S. W. 921, 4 L. R. A. (N. S.) 922; *Spinney v. Eaton*, 111 Me. 1, 87 Atl. 378, 46 L. R. A. (N. S.) 535.

¹³ *Walls v. Stewart*, 16 Pa. 281; *Ives v. Canby* (C. C.) 48 Fed. 718; *Tennille v. Phelps*, 49 Ga. 532.

The rule that demonstrative legacies or such as are payable out of a specific fund are preferred as to that fund in case of a deficiency of assets to pay all the legacies is a rule of intention merely, and yields to the meaning of the will.¹⁴

§ 121. General devises or legacies

A *general* legacy or devise is of a given quantity of money, land or goods, not limited to any particular fund or piece of property; as, a gift of "one thousand dollars," "fifty shares of bank stock" or "eighty acres of land."¹⁵ Such a bequest must be discharged out of any property of the same general character owned by the testator at the time of his death, not otherwise specifically devised or bequeathed.

It is even said that if the testator has given a general legacy or devise, such as "fifty shares of bank stock" or "eighty acres of land" when he owns no property of that description, it amounts by inference to a direction to his executor to procure, out of the general funds of the estate, property of the character and quantity stated and give it to the legatee or devisee.

¹⁴ *Rambo v. Rumer*, 4 Del. Ch. 9.

¹⁵ *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; *Gilmer v. Gilmer*, 42 Ala. 9; *Harper v. Bibb*, 47 Ala. 547; *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785; *Myers' Ex'r v. Myers*, 33 Ala. 85; *Graham v. De Yampert*, 106 Ala. 279, 17 South. 355.

§ 122. Residuary devise and legacies

A *residuary* devise or bequest is a gift of all the "rest" or "remainder" of the testator's property after certain specific or general gifts are discharged. It may be the residue of property of a particular kind, or the residue of all the property generally.

No particular mode of expression is necessary to constitute a residuary devise. It is sufficient if the intention of the testator be plainly expressed in the will that the surplus of the estate, after payment of debts and legacies, shall be taken by a person there designated.¹⁶

The residuary estate must bear all the losses, but it has, by way of compensation, the advantage of any increase in value of the estate, and, under the modern rule, it draws to itself all lapsed gifts and those that for any reason do not take effect, as well as all property not specifically disposed of.¹⁷

¹⁶ Upham's Estate, 127 Cal. 90, 59 Pac. 315; Williams' Estate, 112 Cal. 521, 44 Pac. 808, 53 Am. St. Rep. 224.

¹⁷ Beadle v. Beadle (C. C.) 40 Fed. 315; Granniss' Estate, 142 Cal. 1, 75 Pac. 324; O'Connor v. Murphy, 147 Cal. 148, 81 Pac. 406; Ratto's Estate, 149 Cal. 552, 86 Pac. 1107; Ostrom v. De Yoe, 4 Cal. App. 326, 87 Pac. 811; Giddings v. Giddings, 65 Conn. 149, 32 Atl. 334, 48 Am. St. Rep. 192; Magee v. Alba, 9 Fla. 382; Word v. Mitchell, 32 Ga. 623; Thweatt v. Redd, 50 Ga. 181; Camp v. Vaughan, 119 Ga. 131, 46 S. E. 79; Craig v. Rowland, 10 App. D. C. 402; Dillard v. Ellington, 57 Ga. 567; Paul v. Ball, 31 Tex. 10; Shockley v. Parvis, 4 Houst. (Del.) 568; Mayer v. Am. Sec. & Tr. Co., 33 App. D. C. 391; Hinzie v. Hinzie, 45 Tex. Civ. App. 297, 100 S. W. 803.

At common law a void devise of lands descended to the heir. Williams v. Whittle, 50 Ga. 523; Ridgely v. Bond, 18 Md. 433.

Where several residuary legatees are named an equal division among them is implied.¹⁸

Provision for pro rata increase or decrease of legacies on surplus or deficit of personal property is sometimes used in place of a residuary clause, but rarely answers.¹⁹

§ 123. Various forms of testamentary gifts

Legacies to the same person repeated in different parts of the same will²⁰ or in the will and codicil,²¹ even though the amount be identical, are presumed to be cumulative and the legatee takes both. But where a gift is repeated in the same *paragraph* of the will in the same words and amount the legatee is entitled to but one legacy.²²

A gift of an aliquot part of an estate means not of

¹⁸ Morrison's Estate, 138 Cal. 401, 71 Pac. 453.

¹⁹ Cooch v. Clark, 8 Del. Ch. 299, 68 Atl. 247.

²⁰ Blakeslee v. Pardee, 76 Conn. 263-269, 56 Atl. 503; Farnam v. Farnam, 53 Conn. 290, 2 Atl. 325, 5 Atl. 682; Waddell v. Leonard, 53 Ga. 694.

A later gift by will is presumed to be cumulative to a prior gift inter vivos. Smith v. Marshall, 1 Root (Conn.) 161.

²¹ Hollister v. Shaw, 46 Conn. 256; In re Zeile, 74 Cal. 125-140, 15 Pac. 455.

Substituted or additional legacy is prima facie payable out of same funds, and subject to same incidents and conditions as original legacy, whether result is advantageous to legatee or not. De Laveaga's Estate, 119 Cal. 653, 51 Pac. 1074.

²² Thompson v. Betts, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235.

the gross estate, but after deducting debts and charges.²³

The payment of a legacy may be conditioned on the estate amounting to a certain sum.²⁴ If a gift be so uncertain in amount or character that the court cannot determine its extent, it is void for uncertainty.²⁵

A right given to a devisee to select land must be fairly exercised.²⁶ Water rights in an irrigation company may pass to devisees as appurtenant to a devise of land.²⁷ But any easement in the land devised may be the subject of a separate gift.²⁸ Chattels real may arise from a provision for the use only of real estate.²⁹

One has no property in his dead body that he can dispose of by will.³⁰

²³ *Wilcox v. Beecher*, 27 Conn. 138.

Alternative bequest upheld. *University of Colorado v. Wilson*, 54 Colo. 510, 131 Pac. 422.

²⁴ *Kirkman v. Mason*, 17 Ala. 134.

²⁵ *Traylor's Estate*, 81 Cal. 10, 22 Pac. 297, 15 Am. St. Rep. 17; *Koppikus' Estate*, 1 Cal. App. 84, 81 Pac. 732.

²⁶ *Brown v. Hardin*, 21 Ark. 324.

²⁷ *Thomas' Estate*, 147 Cal. 236, 81 Pac. 539.

²⁸ *Welch v. Huse*, 49 Cal. 506.

²⁹ *Zeller v. Eckert*, 4 How. 289, 11 L. Ed. 979; *Le Breton v. Cook*, 107 Cal. 410, 40 Pac. 552; *Borum v. Gregory*, 119 Ga. 766, 47 S. E. 192; *Holland v. Zeigler*, 135 Ga. 512, 69 S. E. 824; *Black v. Nolan*, 132 Ga. 452, 64 S. E. 647; *Harber v. Nash*, 126 Ga. 777, 55 S. E. 928; *McKinney v. Wells*, 64 Ga. 450; *Beall v. Drane*, 25 Ga. 430.

³⁰ *Enos v. Snyder*, 131 Cal. 68, 63 Pac. 170, 53 L. R. A. 221, 82 Am. St. Rep. 330.

A testator may provide by will for the erection of a monument over his grave. *McIlvain v. Hockaday*, 36 Tex. Civ. App. 1, 81 S. W. 54.

§ 124. Annuities and provisions for support

It is perfectly possible for the testator to provide an annuity for a certain person, or to provide for the support of the widow or others out of the estate or some portion of the property, or for the support, education, etc., of minors. Ordinarily these provisions do not give the beneficiaries any title to the estate or any portion of the property even where a particular part of the property is specially charged with the performance of the obligation.³¹ They may, in the case of minors, be only an incident to a general gift or bequest to the minor, the possession or payment of which is postponed. But usually they constitute mere equitable claims or liens in favor of the person entitled to the support or annuity and are enforceable against the executor, testamentary trustee, residuary devisee or other person in possession of the estate as a trust obligation.³²

³¹ *Gross v. Sheeler*, 7 Houst. (Del.) 280, 31 Atl. 812; *Farnam v. Farnam*, 83 Conn. 369, 77 Atl. 70.

³² *Whitehead v. Park*, 53 Ga. 575; *Blair v. Blair*, 82 Kan. 464, 108 Pac. 827; *Hayne v. Dunlap*, 72 Ga. 534; *Cooper v. Carter*, 145 Mo. App. 387, 129 S. W. 224; *Wiegand v. Woerner*, 155 Mo. App. 227, 124 S. W. 596; *Simons' Will*, 55 Conn. 239, 11 Atl. 36; *Sharp v. Findley*, 71 Ga. 654; *Comstock v. Comstock*, 78 Conn. 606, 63 Atl. 449; *Danish v. Disbrow*, 51 Tex. 235; *Alexander v. Thompson*, 38 Tex. 533; *Wikle v. Woolley*, 81 Ga. 106, 7 S. E. 210; *Hart v. Hart*, 81 Ga. 785, 8 S. E. 182; *Smullin v. Wharton*, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441; *Id.*, 86 Neb. 553, 125 N. W. 1112.

Provision for support of a person may be charged by will upon the property devised without giving the person any interest in the property. (*Busby v. Lynn*, 37 Tex. 146, limited); *Lynn v. Busby*, 46 Tex. 600.

Whether one whose support is charged on the estate is entitled to an allowance of money for that purpose depends on a construction of the will in the light of surrounding circumstances.³³

§ 125. Proceeds of insurance

Whether and in what cases the proceeds of insurance policies on the life of the testator will pass under the provisions of his will are questions dependent upon the nature of the insurance and the terms and conditions of the policy. Ordinary life insurance, sometimes called "old line" insurance is a contract by which the company agrees, in consideration of the payment of premiums, that it will, upon the happening of a certain event, to wit, the death of the insured, pay a certain sum to a certain beneficiary. Strictly speaking, the proceeds of the policy do not become the property of the insured at all, unless he exercises his right under the policy to take a cash surrender value in his lifetime. He has the right to designate the beneficiary, or perhaps, by complying with certain conditions, to change the beneficiary, or possibly to appoint the beneficiary by will but under the strict view of the contract he is not regarded as the owner of the fund that

³³ *McCreary v. Robinson*, 94 Tex. 221, 59 S. W. 536; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Block v. Mauck* (Tenn. Ch. App.) 52 S. W. 689; *Fraser v. Hayes* (Tenn. Ch. App.) 46 S. W. 475; *Loomis v. Loomis*, 35 Barb. (N. Y.) 628; *Tolley v. Greene*, 2 Sandf. Ch. (N. Y.) 91; *Crocker v. Crocker*, 11 Pick. (Mass.) 252; *Conkey v. Everett*, 11 Gray (Mass.) 95; *Willett v. Carroll*, 13 Md. 459.

comes into existence only at his death. It is held that money due under policies of insurance is payable directly to the beneficiaries named, and does not become part of the assets of the estate so as to pass under the terms of a general or residuary devise. Even if the policy provides that the insured may dispose of the amount by will, this is regarded as a naked power of appointment which must be specifically exercised.³⁴ This principle is even more true of mutual or fraternal insurance, which is supposed to be limited by its very nature to certain dependent members of the insured's family.³⁵

While the beneficiary named in the certificate of a member of a fraternal benefit society may be changed by the member, in accordance with the laws of the society, the insured has no interest in the fund derived from his membership nor can such fund become part of his estate or liable for his debts.³⁶ This principle

³⁴ *Graham v. Allison*, 24 Mo. App. 516; *Evans v. Opperman*, 76 Tex. 293, 13 S. W. 312; *Schaadt v. Mut. Life Ins. Co.*, 2 Cal. App. 715, 84 Pac. 249.

Assignment of an insurance policy a few days before death is akin to a testamentary act. *Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357.

Insurance is a vested interest of the *beneficiary* and as such will pass by will. *Thompson v. Aetna L. I. Co.*, 161 Ala. 507, 49 South. 802.

³⁵ *Olmstead v. Benefit Soc.*, 37 Kan. 93, 14 Pac. 449.

³⁶ *Boice v. Shepard*, 78 Kan. 308, 96 Pac. 485; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166.

A will disposing of a benefit certificate which formed no part of the holder's estate, and was not a subject of bequest, may consti-

may be varied by the wording of the particular policy or the terms of the particular kind of insurance. If the policy is payable to a named beneficiary, or even if payable to his "legal heirs," being definite individuals who come into existence at his death, it is held that the insured has no property in it that would pass under his will. But if it is payable to his "estate"³⁷ or to his "legal representatives,"³⁸ which means his estate, it will pass under a residuary clause of the will and be liable for his debts. In all cases bequests of insurance are regarded as specific bequests, and if the insurance is not collectible or has been surrendered during the testator's lifetime the gift fails.³⁹

tute a valid written designation of the beneficiaries in compliance with the requirements of the association. *Grand Lodge v. Bollman*, 22 Tex. Civ. App. 106, 53 S. W. 829.

In 1905 statute of Kansas provided that in case beneficiary in policy dies before insured and insured dies without naming another beneficiary or disposing of the insurance by will it shall go to the estate of insured. This statute does not apply to fraternal insurance. *Boice v. Shepard*, 78 Kan. 308-311, 96 Pac. 485.

³⁷ *Stoelker v. Thornton*, 88 Ala. 241, 6 South. 680, 6 L. R. A. 140.

³⁸ *Walker v. Peters*, 139 Mo. App. 681, 124 S. W. 35; *Schumacher v. Schumacher*, 32 Tex. Civ. App. 497, 75 S. W. 50.

³⁹ *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; *Kramer v. Lyle* (D. C.) 197 Fed. 618; *Keller v. Gaylor*, 40 Conn. 348.

§ 126. Legatees and devisees

Description or designation of the persons who are the objects of the testator's bounty is governed by the same rules regarding certainty, as descriptions of the subject matter of the gift. A devise does not fail because of misnomer, if the evidence points out with clearness the person intended.⁴⁰ If no person meets the description in the will as to legatee, the legacy is void, and if it be a residuary legacy the testator dies intestate as to such residue.⁴¹

A corporation may be a devisee especially of a charitable gift, and does not suffer from a misnomer which may be corrected by parol.⁴² But an unincorporated society has no capacity to take.⁴³ The burden

⁴⁰ *St. Louis Hospital Ass'n. v. Williams*, 19 Mo. 609; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642. "My children now living" is sufficiently definite. *Watson v. Watson*, 110 Mo. 164. But where Mr. Shaw gave a bequest to each of his employees who had been in his service a certain time, it was held not to extend to employees of the city of St. Louis employed in Shaw's Garden, of which Mr. Shaw was the donor and permanent superintendent. *In re Estate of Shaw*, 51 Mo. App. 112.

⁴¹ *Lehnhoff v. Theine*, 184 Mo. 346, 83 S. W. 469.

A bequest to "A's estate," A being alive at the date of the will, but having predeceased the testator, is void as not describing a person or entity capable of taking. *Estate of Glass*, 164 Cal. 765, 130 Pac. 868.

⁴² *Williams v. Pearson*, 38 Ala. 299; *Alabama Conference v. Price*, 42 Ala. 39; *Mayor of Huntsville v. Smith*, 137 Ala. 382, 35 South. 120; *Carter v. Balfour's Adm'r*, 19 Ala. 814; *Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *Beardsley v. Am. House Miss. Soc.*, 45 Conn. 327; *First Cong. Soc. v. Atwater*, 23 Conn. 34; *Colbert v. Speer*, 24 App. D. C. 187; *Heist v. Universalist G. C.*, 76 Tex. 514, 13 S. W. 552.

⁴³ *Greene v. Dennis*, 6 Conn. 300, 16 Am. Dec. 58; *Kennett v. Kidd*, 87 Kan. 652, 125 Pac. 36, 44 L. R. A. (N. S.) 544, *And's Cas.* 1914A, 592.

is not on the corporation to show capacity to take devises but on those who allege incapacity.⁴⁴

For any purpose within the scope of its duties a devise may be made to a city,⁴⁵ a school district,⁴⁶ a county⁴⁷ or the general government. The capacity of a foreign corporation to take a devise of land may, however, be affected by the statutes or rules of property of the state wherein the land lies.⁴⁸ The capacity of a legatee to take a legacy depends upon the law of the domicile of the legatee except where the law of the domicile of the testator forbids such bequests when they are void everywhere.⁴⁹

⁴⁴ *White v. Howard*, 38 Conn. 342; *Conklin v. Davis*, 63 Conn. 382, 28 Atl. 537; *Hewitt v. Wheeler School*, 82 Conn. 188, 72 Atl. 935; *Colbert v. Speer*, 24 App. D. C. 187.

⁴⁵ *Delaney v. Salina*, 34 Kan. 532, 9 Pac. 271; *Chambers v. City of St. Louis*, 29 Mo. 543; *City of Huntsville v. Smith*, 137 Ala. 382, 35 South. 120; *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *Handley v. Palmer* (C. C.) 91 Fed. 948.

⁴⁶ *Bulmer's Estate*, 59 Cal. 131.

⁴⁷ *Fulbright v. Perry Co.*, 145 Mo. 432, 46 S. W. 955.

⁴⁸ By statute of New York a devise of lands in that state can only be made to natural persons and to such corporations as are created under the laws of the State and are authorized to take by devise. A devise to the government of the United States is void. *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192.

⁴⁹ *Pottstown Hospital v. N. Y. Life I. & T. Co.* (D. C. N. Y.) 208 Fed. 196.

§ 127. Gifts to religious persons, bodies, or purposes

Many state statutes and constitutions contain restrictions, total or partial, against gifts to ecclesiastical corporations or for religious purposes. These statutes and constitutional provisions are a relic of past generations and have been curtailed rather than extended in recent years. In England gifts were declared void if made for superstitious uses: i. e., those connected with the Catholic religion. In this country, where we have never had a state church and where we are proud of our complete religious tolerance, there is no use that may be properly condemned by the courts as superstitious.⁵⁰ Positive restrictions in state constitutions or statutes must, however, be observed.⁵¹ Bequests to be used for masses for the repose of testator's soul have been held valid by some courts⁵² and void by others.⁵³

⁵⁰ One may will his property for the promotion of any object that is not illegal, immoral or against the public policy of the State. In *re Bissell*, 63 Neb. 585, 88 N. W. 683.

⁵¹ *White v. Keller*, 68 Fed. 796, 15 C. C. A. 683; *Newton v. Carbery*, 5 Cranch, C. C. 632, Fed. Cas. No. 10,190.

⁵² *Estate of Lennon*, 152 Cal. 327, 92 Pac. 870, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024.

⁵³ *Festorazzi v. St. Joseph's Church*, 104 Ala. 327, 18 South. 394, 25 L. R. A. 360, 53 Am. St. Rep. 48.

§ 128. Gifts to a class

A devise or bequest may be made to several either as individuals or as a class. If as individuals they take as tenants in common;⁵⁴ if as a class they take by a species of joint tenancy in which there is a survivorship between the members of the class up to the time of final division.⁵⁵ The law prefers a tenancy in common to a joint tenancy.⁵⁶

A gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions, the share of each being dependent for its amount upon the ultimate number.⁵⁷

⁵⁴ *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885; *Dryer v. Crawford*, 90 Ala. 131, 7 South. 445; *Davis v. Smith*, 4 Har. (Del.) 68; *Dunn v. Bryan*, 38 Ga. 154; *Bowen v. Nelson*, 135 Ga. 567, 69 S. E. 1115; *Cohen v. Herbert*, 205 Mo. 537, 104 S. W. 84, 120 Am. St. Rep. 772; *N. E. Mtg. & Sec. Co. v. Gordon*, 95 Ga. 781, 22 S. E. 706; *McCord v. Whitehead*, 98 Ga. 381, 25 S. E. 767.

⁵⁵ *Inge v. Jones*, 109 Ala. 175, 19 South. 435; *Jacobs v. Bradley*, 36 Conn. 369; *Bolles v. Smith*, 39 Conn. 220; *Rockwell v. Swift*, 59 Conn. 289, 20 Atl. 200; *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752; *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. 331; *Rixey v. Stuckey*, 129 Mo. 377, 31 S. W. 770; *Records v. Fields*, 155 Mo. 314, 55 S. W. 1021; *Dodge v. Sherwood*, 176 Mo. 33, 75 S. W. 417; *Estate of Murphy*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110; *Winter's Estate*, 114 Cal. 186, 45 Pac. 1063; *Estate of Cavarly*, 119 Cal. 406, 410, 51 Pac. 629; *O'Brien v. Dougherty*, 1 App. D. C. 148; *Thornton v. Zea*, 22 Tex. Civ. App. 509, 55 S. W. 798.

When the estate is divided between two classes there is no survivorship, except between members of the same class. *Booth v. Ward*, 1 Del. Ch. 345.

⁵⁶ *Bill v. Payne*, 62 Conn. 142, 25 Atl. 354.

⁵⁷ *Estate of Murphy*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110.

Where the devisees are named and their particular share is stated, the gift is individual and not to a class,⁵⁸ and there is no survivorship.⁵⁹ The English rule, which prevails in Massachusetts, New York and some other states is that a gift to children, grandchildren or heirs is equivalent to naming them, and is a gift to them individually and not as a class, is not the American rule generally.⁶⁰

A legacy to a class of persons will embrace all who answer the description when the gift takes effect. Thus a bequest to A for life with remainder to his children all the children born before the termination of the life estate, whether before or after the death of

⁵⁸ Estate of Murphy, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110; Hittell's Estate, 141 Cal. 435, 75 Pac. 53; Bill v. Payne, 62 Conn. 141, 25 Atl. 354; Morris v. Bolles, 65 Conn. 45, 31 Atl. 538; Rockwell v. Bradshaw, 67 Conn. 8, 34 Atl. 758; Doe d. Ingram v. Girard, 1 Houst. (Del.) 276.

The designation of the names of legatees usually makes them tenants in common, even though they are otherwise a class, but this may be controlled by the construction of the will as a whole. Where obligations are imposed upon them jointly they may take as a class, even though named individually. Bolles v. Smith, 39 Conn. 217; Talcott v. Talcott, 39 Conn. 186; Warner's Appeal, 39 Conn. 253.

⁵⁹ Bill v. Payne, 62 Conn. 140, 25 Atl. 354; Estate of Kunkler, 163 Cal. 797, 127 Pac. 43; Hearn v. Cannon, 4 Houst. (Del.) 20.

Except in Louisiana. In Louisiana a legacy to two persons "to be divided equally between them" is a conjoint one. If but one of them survives the testator, he is entitled, by accretion, to the whole of the thing bequeathed. Mackie v. Story, 93 U. S. 589, 23 L. Ed. 986.

⁶⁰ Raymond v. Hillhouse, 45 Conn. 467-474, 29 Am. Rep. 688; Warner's Appeal, 39 Conn. 253; Hittell's Estate, 141 Cal. 435, 75 Pac. 53; Estate of Henderson, 161 Cal. 353, 119 Pac. 496; Haas v. Atkinson, 20 D. C. 537.

Not a class. Richardson v. Raughley, 1 Houst. (Del.) 561.

the testator, will take.⁶¹ Even though the remainder be vested it opens to let in after born members of the class.⁶²

Membership in a class is determined at the time when the estate vests. As a general rule this is at the death of the testator, whether the estate be one in possession or one in remainder⁶³ for even estates in remainder vest at the death of the testator. Words of survivorship *prima facie* apply to the death of the testator,⁶⁴ but the words of the will may make the survivorship apply to some other period as the termination of a particular estate,⁶⁵ or the taking effect of an

⁶¹ *Banks v. Jones*, 50 Ala. 480; *Jones' Appeal*, 48 Conn. 60; *Crook's Estate*, Myr. Prob. (Cal.) 247; *Robertson v. Garrett*, 72 Tex. 372, 10 S. W. 96.

Where a devise is made for the children of two daughters, *prima facie* they take as classes in two groups, each group one-half. *Ferry v. Langley*, 12 D. C. 140.

⁶² *Throop v. Williams*, 5 Conn. 99; *Webster v. Welton*, 53 Conn. 183, 1 Atl. 633; *Jones' Appeal*, 48 Conn. 67; *Webb v. Goodnough*, 53 Conn. 220, 1 Atl. 797; *Farnam v. Farnam*, 53 Conn. 287, 2 Atl. 325, 5 Atl. 682; *Cowles v. Cowles*, 56 Conn. 247, 13 Atl. 414; *Beckley v. Leffingwell*, 57 Conn. 167, 17 Atl. 766; *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325; *Craig v. Rowland*, 10 App. D. C. 402.

An unborn child usually takes as member of a class. *Cowles v. Cowles*, 56 Conn. 247, 13 Atl. 414; *Craig v. Rowland*, 10 App. D. C. 402; *Groce v. Rittenberry*, 14 Ga. 233.

⁶³ *Wood v. McGuire*, 15 Ga. 202; *Davie v. Wynn*, 80 Ga. 673, 6 S. E. 183; *Gillespie v. Schuman*, 62 Ga. 252; *Lewis v. Lewis*, 62 Ga. 265.

⁶⁴ *Vickers v. Stone*, 4 Ga. 461; *O'Brien v. Dougherty*, 1 App. D. C. 148; *Hill v. Hill*, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97.

⁶⁵ *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605.

Presumption of death from seven years' absence does not carry

executory devise.⁶⁶ Those who predecease the testator or the period when the class is determined, are not members.⁶⁷

§ 129. Per capita and per stirpes

As a general rule where a gift is made to named individuals⁶⁸ or made to a class whose members stand in equal degree of relationship to the testator they take per capita,⁶⁹ but where the degree of relationship is different or the right depends upon representation⁷⁰ or operation of law⁷¹ they take per stirpes.⁷²

presumption that person left no children, so as to make definite the member of a class at the death of life tenant. *Furr v. Burns*, 124 Ga. 742, 53 S. E. 201.

Although the death of the life tenant be the time of determining the members of a class who shall take in remainder, yet they take from the testator and not from the life tenant. *Burch v. Burch*, 23 Ga. 536.

⁶⁶ *White v. Rowland*, 67 Ga. 546, 44 Am. Rep. 731.

⁶⁷ *Fulghum v. Strickland*, 123 Ga. 258, 51 S. E. 294; *Davis v. Sanders*, 123 Ga. 177, 51 S. E. 298; *Crawley v. Kendrick*, 122 Ga. 183, 50 S. E. 41, 2 Ann. Cas. 643; *Tolbert v. Burns*, 82 Ga. 213, 8 S. E. 79; *Martin v. Trustees*, 98 Ga. 320, 25 S. E. 522; *Watkins v. Blount*, 43 Tex. Civ. App. 460, 94 S. W. 1116.

⁶⁸ *De Laurencel v. De Boom*, 67 Cal. 362, 7 Pac. 758; *Post v. Jackson*, 70 Conn. 283, 39 Atl. 151; *Kean's Lessee v. Roe*, 2 Har. (Del.) 103, 29 Am. Dec. 336; *Almand v. Whitaker*, 113 Ga. 889, 39 S. E. 395; *Follansbee v. Follansbee*, 7 App. D. C. 282.

⁶⁹ *McIntire v. McIntire*, 192 U. S. 116, 24 Sup. Ct. 196, 48 L. Ed. 369; *Id.*, 14 App. D. C. 337.

Per capita and not per stirpes. *Payne v. Rosser*, 53 Ga. 662; *Huggins v. Huggins*, 72 Ga. 825.

⁷⁰ *Walker v. Griffin*, 11 Wheat. 375, 6 L. Ed. 498; *Lyon v. Acker*, 33 Conn. 222; *Haas v. Atkinson*, 20 D. C. 537; *MacLean v. Williams*, 116 Ga. 257, 42 S. E. 485, 59 L. R. A. 125.

⁷¹ *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. 885.

⁷² *Billinslea v. Abercrombie*, 2 Stew. & P. (Ala.) 24; *Atkins v.*

§ 130. Ademption

Ademption is invoked only where the gift is by a parent, or one standing in loco parentis, to a child. In case a parent has given a legacy to a child by will, and afterward during his lifetime, makes a gift or advancement to the same child of property of the same kind, the courts presume that he intends to adeem or revoke the legacy, in whole or pro tanto.⁷³ This presumption serves the same purpose as the doctrine of advancements in case of intestacy—that of securing substantial equality among the heirs. The doctrine of ademption applies only to bequests of personal property and does not apply where there is a valid consideration for the conveyance.

Whether a gift is an ademption of a legacy is a question purely of intention on the part of the testa-

Guice, 21 Ark. 164; *Kidwell v. Ketler*, 146 Cal. 12, 79 Pac. 514; *Talcott v. Talcott*, 39 Conn. 189; *Raymond v. Hillhouse*, 45 Conn. 467, 29 Am. Rep. 688; *Heath v. Bancroft*, 49 Conn. 220; *Lockwood's Appeal*, 55 Conn. 157, 10 Atl. 517; *Geery v. Skelding*, 62 Conn. 499, 27 Atl. 77; *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537; *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106.

Per stirpes and not per capita. *Fraser v. Dillon*, 78 Ga. 474, 3 S. E. 695; *Mayer v. Hover*, 81 Ga. 308, 7 S. E. 562; *Randolph v. Bond*, 12 Ga. 362; *Dunihue v. Hurd*, 50 Tex. Civ. App. 360, 109 S. W. 1145.

⁷³ *Wilson v. Smith* (C. C.) 117 Fed. 707; *Fisher v. Keithley*, 142 Mo. 244, 43 S. W. 650, 64 Am. St. Rep. 560; *Waters v. Hatch*, 181 Mo. 287, 79 S. W. 916; *Roberts v. Weatherford*, 10 Ala. 72; *Duckworth's Ex'r v. Butler*, 31 Ala. 164; *Gilmer v. Gilmer*, 42 Ala. 9.

Executor cited to show cause why he should not pay a legacy may plead that it has been adeemed. *Medlock v. Miller*, 94 Ga. 652, 19 S. E. 978.

tor.⁷⁴ It is rarely implied where the intent to make cumulative gifts would be natural and consistent. Thus gifts prior to the will⁷⁵ or cumulative legacies given by a codicil⁷⁶ are not ademptive, nor does the doctrine apply to residuary gifts.⁷⁷ By statute the common law rule of ademption is extended to those to whom the testator does not stand in loco parentis.⁷⁸

The term ademption has been applied, also, to what is more properly revocation pro tanto; that is, to dealings by the testator with the property devised in such a way as to make it impossible to carry out the directions of the will.⁷⁹ It has been extended, by analogy to devises of lands.

A conveyance of lands to one, to whom, by will executed prior thereto the same lands had been devised, would operate as a satisfaction of the devise, precisely as the settlement of a portion on a legatee is an ademption of the legacy; otherwise

⁷⁴ *Kenaday v. Sinnott*, 179 U. S. 606, 21 Sup. Ct. 233, 45 L. Ed. 339; *Wilmerton v. Wilmerton*, 176 Fed. 896, 100 C. C. A. 366, 28 L. R. A. (N. S.) 401; *May v. May*, 28 Ala. 141; *Cowles v. Cowles*, 56 Conn. 240, 13 Atl. 414; *Ives v. Canby* (C. C.) 48 Fed. 718; *Beall v. Blake*, 16 Ga. 119; *Rogers v. French*, 19 Ga. 317; *Miller v. Payne*, 28 App. D. C. 396-404.

⁷⁵ *Chapman v. Allen*, 56 Conn. 152, 14 Atl. 780.

⁷⁶ *In re Zeile*, 74 Cal. 125, 15 Pac. 455.

⁷⁷ *Davis v. Whitaker*, 38 Ark. 435.

Advance to son-in-law is not ademption of legacy to daughter. *Hart v. Johnson*, 81 Ga. 734, 8 S. E. 73.

⁷⁸ *Miller v. Payne*, 28 App. D. C. 396-403.

⁷⁹ *Conn. T. & S. D. Co. v. Chase*, 75 Conn. 683, 55 Atl. 171; *Douglass v. Douglass*, 13 App. D. C. 21; *Smith v. Smith*, 23 Ga. 21; *Whitlock v. Vaun*, 38 Ga. 562; *Plant v. Donaldson*, 39 App. D. C. 162; *Galloway v. Galloway*, 32 App. D. C. 76; *Carr v. Berry*, 116 Ga. 372-374, 42 S. E. 726; *Reed v. Reed*, 68 Ga. 589.

when the conveyance is not of the same lands which were devised.⁸⁰

But such intention is not presumed from a mere alteration in the estate of the testator.⁸¹

§ 131. Lapse

A gift is said to lapse when the beneficiary dies in the lifetime of the testator,⁸² or before the estate vests, or when the gift is void and cannot take effect.⁸³ Formerly the English courts allowed the residuary legatee to take all lapsed gifts of personal property,⁸⁴ but all lands and interests therein not expressly devised by the will, or the devise of which for any reason failed, were given to the heir-at-law. This rule has been changed by the help of statute and the presumption against partial intestacy, so that a residuary devise or bequest now carries everything the testator

⁸⁰ *Marshall v. Rench*, 3 Del. Ch. 239; *Morrill v. Gill*, 46 Ga. 482.

⁸¹ *Jacobs v. Button*, 79 Conn. 360, 65 Atl. 150.

⁸² *Miller v. Metcalf*, 77 Conn. 176, 58 Atl. 743; *Neil's Estate*, Myr. Prob. (Cal.) 79; *Hinckley's Estate*, Myr. Prob. (Cal.) 189; *Sutro's Estate*, 139 Cal. 87, 72 Pac. 827; *Martin v. Lackasse*, 47 Mo. 591; *Lemmons v. Reynolds*, 170 Mo. 227, 71 S. W. 135; *Galloway v. Darby*, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782.

⁸³ *Wolfe v. Hatheway*, 81 Conn. 181, 70 Atl. 645; *Hartford Tr. Co. v. Wolcott*, 85 Conn. 134, 81 Atl. 1057; *O'Connor v. Murphy*, 147 Cal. 148, 81 Pac. 406; *Estate of Russell*, 150 Cal. 604, 89 Pac. 345; *Kinne v. Phares*, 79 Kan. 366, 100 Pac. 287; *Bollinger v. Knox*, 3 Neb. (Unof.) 811, 92 N. W. 994; *Moss v. Helsley*, 60 Tex. 426.

⁸⁴ A lapsed or void legacy of personal property passes to the residuary legatee, not to the next of kin. *Roberson v. Roberson*, 21 Ala. 273; *Pool v. Harrison*, 18 Ala. 514; *Alston v. Coleman*, 7 Ala. 795; *Johnson v. Holifield*, 82 Ala. 123, 2 South. 753; *Pool v. Harrison*, 18 Ala. 514; *Abercrombie's Ex'r v. Abercrombie*, 27 Ala. 489.

has failed to dispose of,⁸⁵ unless a contrary intention appears from the will.⁸⁶

Of course the will may contain express provision for substitution if devisee or legatee die before the testator.⁸⁷ Where there is no residuary devise or bequest⁸⁸ or the person who is to take some part of the residuary estate, individually and not as member of a class, dies before the testator, there is a partial intestacy which is unavoidable.⁸⁹

If a gift be made by a parent to a child or grandchild, the doctrine of lapse would often defeat the real intention of the testator, which would be to provide for such child and its descendants. The statutes of some states provide that if a gift be made to a "child, grandchild, or other relative" of the testator, who dies

⁸⁵ *Erwin v. Henry*, 5 Mo. 469; *Carr v. Dings*, 58 Mo. 400; *Brown v. Stark*, 47 Mo. App. 370; *McQueen v. Lilly*, 131 Mo. 9, 31 S. W. 1043; *Three States Lumber Co. v. Rogers*, 145 Mo. 445, 46 S. W. 1079; *Mueller v. Buenger*, 184 Mo. 458, 83 S. W. 458, 67 L. R. A. 648, 105 Am. St. Rep. 541; *Sullivan v. Larkin*, 60 Kan. 545, 57 Pac. 105; *Johnson v. Holifield*, 82 Ala. 123, 2 South. 753; *Waterman v. Canal Louisiana Bank*, 186 Fed. 71, 108 C. C. A. 183; *Upham's Estate*, 127 Cal. 90, 59 Pac. 315; *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. 687; *Rockwell v. Bradshaw*, 67 Conn. 8, 34 Atl. 758; *Lenz v. Sens*, 27 Tex. Civ. App. 442, 66 S. W. 110; *Galloway v. Darby*, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782.

⁸⁶ *Moss v. Helsley*, 60 Tex. 426-437.

⁸⁷ *Bennett's Estate*, 134 Cal. 320, 66 Pac. 370.

⁸⁸ *Cooch v. Clark*, 8 Del. Ch. 299, 68 Atl. 247.

⁸⁹ *Bendall v. Bendall*, 24 Ala. 295, 60 Am. Dec. 469; *Hamlet v. Johnson*, 26 Ala. 557; *Colt v. Colt*, 33 Conn. 270; *Hutchinson's Appeal*, 34 Conn. 300; *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. 687; *Bill v. Payne*, 62 Conn. 140, 25 Atl. 354; *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904.

before the testator, leaving descendants, it shall not lapse, but shall go to such descendants.⁹⁰

The statute changes the rule of the common law,⁹¹ and the term "other relative" cannot be extended to persons not related to the testator by consanguinity.⁹²

The child or other descendant taking the gift by substitution for his parent who has predeceased the testator, takes as a purchaser and not by descent and is not chargeable, therefore, with the debts of his parent.⁹³

Where the beneficiary of a life estate dies before the testator this does not defeat the bequest to the remainderman.⁹⁴

⁹⁰ These statutes follow the English Statute of 1 Victoria C. 26; *Jones v. Jones' Ex'r*, 37 Ala. 646; *Estate of Ross*, 140 Cal. 282, 73 Pac. 976; *Estate of Kunkler*, 163 Cal. 797, 127 Pac. 43; *Seery v. Fitzpatrick*, 79 Conn. 562, 65 Atl. 964, 9 Ann. Cas. 139; *Cheney v. Selman*, 71 Ga. 384; *Smith v. Williams*, 89 Ga. 9, 15 S. E. 130, 32 Am. St. Rep. 67.

Statutory rule that bequests to relatives do not lapse by prior decease yields to intention expressed in will. *Estate of Goetz*, 13 Cal. App. 292, 109 Pac. 492.

⁹¹ *Guitar v. Gordon*, 17 Mo. 408; *Jamison v. Hay*, 46 Mo. 546.

⁹² *Pfuelb's Estate*, Myr. Prob. (Cal.) 38; *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931.

⁹³ *Wattenbarger v. Payne*, 162 Mo. App. 434, 145 S. W. 148; *Carson v. Carson*, 1 Metc. (58 Ky.) 300; *Smith v. Smith*, 58 N. C. 305; *In re Hafner*, 45 App. Div. 549, 61 N. Y. Supp. 565-568; *Jones v. Jones*, 37 Ala. 646; *Succession of Morgan*, 23 La. Ann. 290.

Contra: *Denise v. Denise*, 37 N. J. Eq. 163; *Baker v. Carpenter*, 69 Ohio St. 15, 68 N. E. 577; *McConkey v. McConkey*, 9 Watts (Pa.) 352.

⁹⁴ *Estate of Gregory*, 12 Cal. App. 309, 107 Pac. 566; *Billingsley v. Harris*, 17 Ala. 214.

The lapse of a devise of real estate charged with the payment of a specific legacy, by the death of the devisee before the testator

§ 132. Conditions—Affecting entire will

The whole will may be conditional, or a particular clause may have a condition annexed to it. A will is said to be conditional when it is made for a temporary purpose, in view of an impending peril, and is only intended to operate in case death results from that danger. If this conditional character is clearly expressed in the will, it will not operate unless the event occurs as anticipated. Thus a man about to go on a journey, or to engage in a battle or to have an operation performed, may hastily make a will. This testament may not be intended to be his deliberate and final act, but only to tide over a present danger and avoid intestacy in case of death. He may not have provided for all the beneficiaries that he would like; but has simply seized the opportunity to protect a few important objects. Now suppose the man does not die from the threatened peril, but lives through it, and then dies from some other cause, meanwhile allowing the instrument to remain in existence. Is the instrument to operate as his will? This must be determined by a fair construction of the conditional clause of the will, as the testator has there expressed himself. It is not competent to seek the aid of extrinsic evidence on this point. If the testator has plainly said that it is only to operate as his will in case of his death under certain circumstances, that is the only effect that can be given to it.

does not cause the legacy to lapse. *Gilroy v. Richards*, 26 Tex. Civ. App. 355, 63 S. W. 664.

A good illustration of a will so drawn is found in Missouri. The opening clause of the will was as follows: "I this day start for Kentucky, I may never get back. If it should be my misfortune, I give my property to," etc. It was held that the visit to Kentucky was not named merely as the occasion of making the will, as from its supposed risks reminding him of the necessity or propriety of the act; but that his death prior to his return from Kentucky was the *condition* on which the will depended for its efficacy, and in case of his return it became void.⁹⁵ This was held to be a clear case of a conditional will. It frequently happens, however, that the testator mentions some event or occurrence in the opening clause of his will, not necessarily as a condition, but merely as the occasion for making his will. Where this is the construction which can be placed on his language the will is valid if it remain unrevoked at the time of his death, no matter when nor from what cause his death may have occurred.⁹⁶ It is evident that it is well to avoid all

⁹⁵ Robnett v. Ashlock, 49 Mo. 171; White's Estate, Myr. Prob. (Cal.) 157; Vickery v. Hobbs, 21 Tex. 570, 73 Am. Dec. 238; Todd's Will, 2 Watts & S. (Pa.) 145; Eaton v. Brown, 20 App. D. C. 453; Phelps v. Ashton, 30 Tex. 344; Dougherty v. Holscheider, 40 Tex. Civ. App. 31, 88 S. W. 1113.

Conditional will should be refused probate if testator did not die under condition named; but if admitted to probate will cannot be attacked collaterally by proof of failure of condition. Laufer v. Powell, 30 Tex. Civ. App. 604, 71 S. W. 549.

⁹⁶ "Courts do not incline to regard a will as conditional where it reasonably can be held that the testator was merely expressing his inducement to make it, although his language if strictly construed, would express a condition." Eaton v. Brown, 193 U. S. 411, 24 Sup.

such expressions, unless the intention is that the will should be conditional; and in that case to express the condition clearly.

§ 133. Conditions affecting particular gifts

A condition may be annexed to a particular devise or bequest. Where a gift is coupled with a condition, not contrary to public policy, the beneficiary cannot take the gift unless the condition is complied with. It is said that the beneficiaries under a will must take what is given them, burdened with the conditions which the testator has imposed, whether wise or unwise.⁹⁷ Conditions are either precedent or subsequent. A condition precedent is one which must precede or accompany the vesting of the gift and hence it must

Ct. 487, 48 L. Ed. 730; *French v. French*, 14 W. Va. 458; *Damon v. Damon*, 8 Allen (Mass.) 192; *In re Goods of Porter*, L. R. 2 P. & D. 22; *Cody v. Conly*, 27 Grat. (Va.) 313; *Skipwith v. Cabell*, 19 Grat. (Va.) 758; *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908; *Tarver v. Tarver*, 9 Pet. 174, 9 L. Ed. 91; *Sanger v. Butler*, 45 Tex. Civ. App. 527, 101 S. W. 459.

⁹⁷ *Stevens v. De La Vaulx*, 166 Mo. 20, 65 S. W. 1003; *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968; *Smith v. Smith*, 64 Neb. 563, 90 N. W. 560; *Vaughan v. Vaughan's Adm'r*, 30 Ala. 329; *Rogers v. Law*, 1 Black, 253, 17 L. Ed. 58; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640; *Whiting's Appeal*, 67 Conn. 379, 35 Atl. 268; *Bishop v. Howarth*, 59 Conn. 455, 22 Atl. 432; *Barnes v. Kelly*, 71 Conn. 220, 41 Atl. 772; *Lord v. Lord*, 22 Conn. 602; *Dickey v. Dickey*, 94 Fed. 231, 36 C. C. A. 211; *Treat v. Treat*, 35 Conn. 210; *Gwynn v. Gwynn*, 11 App. D. C. 564; *King v. Shelton*, 36 App. D. C. 1.

Devisee may decline a gift upon condition. *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. 331.

Condition that devisee change name. An example of the extremes

be performed before the beneficiary is entitled to the property.⁹⁸ If such condition be void or if it be or become impossible of performance, even though there be no fault on the part of the devisee, the devise cannot take effect.⁹⁹

A condition subsequent, on the other hand, is one which does not prevent the vesting of the estate.¹

It is well settled that if it can be collected from the whole will that the act annexed to the vesting of the estate does not necessarily precede but may accompany or follow it, it is a condition subsequent.² It

to which the folly of a vain, domineering, purse-proud old man may lead. *Taylor v. Mason*, 9 Wheat. 325, 6 L. Ed. 101. But a condition that a wife remain separated from her husband is void as against public policy, and the legatee takes the property freed from the condition. *Witherspoon v. Brokaw*, 85 Mo. App. 169.

⁹⁸ *President of Yale College v. Runkle* (C. C.) 8 Fed. 576; *Mackay v. Moore*, Dud. (Ga.) 94; *Oetjen v. Diemmer*, 115 Ga. 1005, 42 S. E. 388; *Cliett v. Cliett*, 1 Posey, Unrep. Cas. (Tex.) 407; *Fisher v. Fisher*, 80 Neb. 145, 113 N. W. 1004; *Clark v. Fleischmann*, 81 Neb. 445, 116 N. W. 290; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391.

⁹⁹ *Halsey v. Goddard* (C. C.) 86 Fed. 25; *Carter's Heirs v. Carter's Adm'r*, 39 Ala. 579; *Robbins v. Co. Com'rs*, 50 Colo. 610, 115 Pac. 526; *Shockley v. Parvis*, 4 Houst. (Del.) 568, 569; *Mackay v. Moore*, Dud. (Ga.) 94.

Non-performance of a condition precedent is not excused by devisee's ignorance. *Fisher v. Fisher*, 80 Neb. 145, 113 N. W. 1004.

¹ *Alexander v. Alexander*, 156 Mo. 413, 57 S. W. 110; *Platt v. Platt*, 42 Conn. 347; *Finlay v. King*, 3 Pet. 346, 7 L. Ed. 701; *Webster v. Cooper*, 14 How. 488, 14 L. Ed. 510; *In re De Vries*, 17 Cal. App. 184, 119 Pac. 109; *Smith v. Smith*, 64 Neb. 563, 90 N. W. 560.

² *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Jenkins v. Merritt*, 17 Fla. 304; *Winn v. Tabernacle Inf.*, 135 Ga. 380, 69 S. E. 557, 32 L. R. A. (N. S.) 512.

may, if not performed, cause a forfeiture³ or constitute a limitation over to others.⁴

The law is inclined to treat conditions as subsequent rather than precedent in favor of the vesting of estates.⁵ If a condition subsequent be void⁶ or become impossible of performance without fault of the devisee, the estate becomes absolute.⁷ The readiness of the devisee to perform the condition will prevent a forfeiture.⁸ The condition may be waived by the party

³ *Higgins v. Eaton* (C. C.) 178 Fed. 153; *Jacobs v. Bradley*, 36 Conn. 370; *Rockwell v. Swift*, 59 Conn. 289, 20 Atl. 200; *Wheeler v. Walker*, 2 Conn. 196, 7 Am. Dec. 264; *Sands v. Lyon*, 18 Conn. 18-30; *Tappan's Appeal*, 52 Conn. 412; *Huckabee v. Swoope*, 20 Ala. 491; *Smith v. Smith*, 64 Neb. 563, 90 N. W. 560.

⁴ *Doe v. Watson*, 8 How. 263, 12 L. Ed. 1072; *Frey v. Thompson*, 66 Ala. 287; *Drew v. Drew*, 66 Ala. 455; *Grimball v. Patton*, 70 Ala. 626; *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351; *Hoselton v. Hoselton*, 166 Mo. 182, 65 S. W. 1005.

Distinction between limitation of estate and condition-subsequent. A suit by residuary devisees is equivalent to an assertion of forfeiture without actual entry. *Harrison v. Foote*, 9 Tex. Civ. App. 576.

Difference between common law conditions which will work a forfeiture of the estate and directions to trustees for the management of the property pointed out. *Stanley v. Colt*, 5 Wall. 119, 18 L. Ed. 502.

If a devise be upon condition and the condition be complied with, the devisees take a fee. *McCoun v. Lay*, 5 Cranch, C. C. (D. C.) 548, Fed. Cas. No. 8,729; *Derickson v. Garden*, 5 Del. Ch. 323.

⁵ *Green v. Gordon*, 38 App. D. C. 443.

⁶ *Carter's Heirs v. Carter's Adm'r*, 39 Ala. 579; *In re Walkerly*, 108 Cal. 627-650, 41 Pac. 772, 49 Am. St. Rep. 97.

⁷ *Shockley v. Parvis*, 4 Houst. (Del.) 568; *New Haven Co. v. Trinity Church Parish*, 82 Conn. 378, 73 Atl. 789, 17 Ann. Cas. 432; *Huckabee v. Swoope*, 20 Ala. 491; *Pitts v. Campbell*, 173 Ala. 604, 55 South. 500; *Green v. Gordon*, 38 App. D. C. 443; *Harrison v. Harrison*, 105 Ga. 517, 31 S. E. 455, 70 Am. St. Rep. 60.

⁸ *Seeley v. Hincks*, 65 Conn. 1, 31 Atl. 533; *Hurd Tr. v. Shelton*,

entitled to its performance.⁹ The legal title is in the devisee and there must be a re-entry for condition broken to divest that title.¹⁰ Forfeitures are not favored in the law and conditions that destroy an estate are taken strictly.¹¹

Generally when a testator requires a thing to be done and provides no security for its performance the provision will be held to amount to a condition to prevent a failure of his purpose.¹² But, usually, the expression of the purpose for which a legacy is given does not constitute either a condition or a trust,¹³ and if it become impossible to apply it, without fault on the part of the legatee, the gift becomes absolute.¹⁴

The conditions most frequently met with are restraints upon marriage, restraints upon alienation, and conditions that the devisee pay money, or perform some obligation to another person.

64 Conn. 496-499, 30 Atl. 766; *Lyman v. Chapin*, 23 Conn. 447; *King v. Gridley*, 46 Conn. 556.

⁹ *Drennen v. Heard* (D. C.) 198 Fed. 414; *Higgins v. Eaton* (C. C.) 188 Fed. 938.

¹⁰ *Mercantile Trust Co. v. Adams*, 95 Ark. 333, 129 S. W. 1101; *Pierce v. Lee*, 197 Mo. 480, 95 S. W. 426; *Roberts v. Crume*, 173 Mo. 572, 73 S. W. 662.

¹¹ *Parks v. Wilkerson*, 134 Ga. 14, 67 S. E. 401, 137 Am. St. Rep. 209; *Jenkins v. Merritt*, 17 Fla. 304; *Jones v. Jones*, 223 Mo. 424, 123 S. W. 29, 25 L. R. A. (N. S.) 424.

¹² *Howze v. Davis*, 76 Ala. 381.

¹³ *Smith v. Phillips*, 131 Ala. 629, 30 South. 872; *Coppedge v. Weaver*, 90 Ark. 444, 119 S. W. 678.

¹⁴ *Bonner v. Young*, 68 Ala. 35; *Kelly v. Kelly's Adm'r*, 3 Pennewill (Del.) 286, 50 Atl. 215.

§ 134. Non-contest clauses

While in the absence of some express condition in the will a legatee is not estopped from claiming his legacy by reason of having contested the will,¹⁵ yet the courts have sustained very generally what are known as non-contest clauses or conditions in wills.

It is said that a condition, providing that if any beneficiary thereunder should contest the will, the devise or bequest to him should be revoked, not only is not repugnant to, but is favored by public policy.¹⁶ Such clause in the will embraces the contest of codicils.¹⁷ The condition may be enforced even though the contest is abandoned by compromise.¹⁸

Some courts hold that the existence of probable ground of contest will prevent forfeiture of legacy¹⁹ and some, that it will not.²⁰ It is held in some states

¹⁵ *State ex rel. v. Adams*, 71 Mo. 620; *Catron's Estate*, 82 Mo. App. 416; *Medill v. Snyder*, 61 Kan. 15, 58 Pac. 962, 78 Am. St. Rep. 307.

¹⁶ *Estate of Hite*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; *Donegan v. Wade*, 70 Ala. 501; *Perry v. Rogers*, 52 Tex. Civ. App. 594, 114 S. W. 897; *Massie v. Massie*, 54 Tex. Civ. App. 617, 118 S. W. 219.

¹⁷ *Estate of Hite*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993.

¹⁸ *Estate of Hite*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993.

¹⁹ *Estate of Friend*, 209 Pa. 442, 58 Atl. 853, 68 L. R. A. 447.

²⁰ *Estate of Miller*, 156 Cal. 119, 103 Pac. 842, 23 L. R. A. (N. S.) 863.

that a gift over is necessary²¹ and in others that the absence of a gift over is not important.²²

When legacies are given to persons upon conditions not to dispute the validity of, or the dispositions in wills or testaments, the conditions are not in general obligatory, but only in *terrorem*. If therefore there exists *probabilis causa litigandi*, the nonobservance of the conditions will not be forfeitures. *Powell v. Morgan*, 2 Vern. 90; *Morris v. Burroughs*, 1 Atk. 404; *Loyd v. Spillet*, 3 P. Wms. 344.

The reason seems to be this: A court of equity does not consider that the testator meant such a clause to determine his bounty, if the legatee resorted to such a tribunal to ascertain doubtful rights under the will, or how far his other interests might be affected by it, but merely to guard against vexatious litigation.

But when the acquiescence of the legatee appears to be a material ingredient in the gift, which is made to determine upon his controverting the will or any of its provisions, and in either of these events the legacy is given over to another person, the restriction no longer continues a condition in *terrorem*, but assumes the character of a conditional limitation. The bequest is only *quousque* the legatee shall refrain from disturbing the will; and if he controvert it, his interest will cease and pass to the other legatee.²³

²¹ *Hoit v. Hoit*, 42 N. J. Eq. 388, 7 Atl. 856, 59 Am. Rep. 43; *Bradford v. Bradford*, 19 Ohio St. 546, 2 Am. Rep. 419; *Cooke v. Turner*, 14 Sims. 493.

"Even when the forfeiture of the legacy has been declared to be the penalty of not conforming to the injunction of the will courts have considered it, if the legacy be not given over, rather as an effort to effect a desired object by intimidation than as concluding the rights of the parties." *Pray v. Belt*, 1 Pet. 670-679, 7 L. Ed. 309.

²² *Matter of Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134; *Estate of Hite*, 155 Cal. 436, 101 Pac. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; *Estate of Miller*, 156 Cal. 119-122, 103 Pac. 842, 23 L. R. A. (N. S.) 868.

²³ *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct.

A bequest upon condition that the legatee present no claim against the estate is forfeited by his presenting a claim.²⁴

§ 135. Restraints upon marriage

As a general rule, conditions in restraint of marriage are void, as against public policy, and the gift becomes absolute and unconditional. This was so held in an early case in Missouri, in which a testator by his will devised to his son and daughter equal shares of a tract of land with the provision that, "if his said daughter should marry or die" the land should belong exclusively to the son. It was held that the condition was in restraint of marriage, and was void as against public policy, and that the daughter took her interest absolutely, and did not lose it by her subsequent marriage.²⁵ This rule has

396, 42 L. Ed. 793; *Id.*, 8 App. D. C. 490; 1 Roper on Legacies, 2 Am. Ed. 795.

²⁴ *Rockwell v. Swift*, 59 Conn. 289, 20 Atl. 200.

A testator provided that if any heir should make "any unjust claim" against his estate he should receive \$1 in lieu of the bequest mentioned in the will. Held a claim which the executor compromised for 50% could not be said to be an unjust claim. *Ritch v. Talbot*, 74 Conn. 137, 50 Atl. 42.

Where there is a legacy in a will conditioned to go to another if the legatees should sue to compel an account for the testator's acts as guardian of the legatees, and the legatees accepted the legacy and enjoyed it for six years, without fraud or mistake, held that they were estopped from suing to compel the account. *Shivers v. Goar*, 40 Ga. 676.

²⁵ *Williams v. Cowden*, 13 Mo. 211, 53 Am. Dec. 143; *Vaughn v. Lovejoy*, 34 Ala. 437; *Estate of Alexander*, 149 Cal. 146, 85 Pac. 308, 9 Ann. Cas. 1141; *Kennedy v. Alexander*, 21 App. D. C. 424; *Knost*

been very generally applied where the condition was a subsequent one; but where the condition is precedent, as requiring the approval of guardians, etc., to the legatee's marriage under twenty-one, before the estate can vest, with a limitation over, the condition is valid.²⁶

It seems, however, that a testator may devise property to his widow with a limitation that it shall go to others upon her remarriage. This is regarded as a valid limitation, and the estate of the widow terminates upon the happening of the event as it would upon the happening of any other event named.²⁷ The rule of public policy does not extend to the remarriage of widows.²⁸

v. Knost, 229 Mo. 170, 129 S. W. 665, 49 L. R. A. (N. S.) 627; Hawke v. Euyart, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391.

A limitation over in case of death of devisee before marriage is not void. Sullivan v. Garesche, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605.

²⁶ Collier, Ex'r v. Slaughter, 20 Ala. 263.

Provision in will that each of testator's daughters receive certain portions of estate on becoming widows or lawfully separated from husband is not void as against public policy in inducing unlawful separation. Born v. Horstmann, 80 Cal. 458, 22 Pac. 169, 338, 5 L. R. A. 577.

²⁷ Vaughn v. Lovejoy, 34 Ala. 437; Helm v. Leggett, 66 Ark. 23, 48 S. W. 675; Estate of Fitzgerald, 161 Cal. 319, 119 Pac. 96, 49 L. R. A. (N. S.) 615; Phillips v. Medbury, 7 Conn. 573; Chappel v. Avery, 6 Conn. 33; Bennett v. Packer, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112; Chapin v. Cooke, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139; Walsh v. Mathews, 11 Mo. 134; Dumey v. Schoeffler,

²⁸ The origin and history of the common and canon law in respect to gifts in restraint of marriage reviewed. Chapin v. Cooke, 73 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139.

§ 136. Restraints upon alienation—Spendthrift trusts

As a general proposition conditions annexed to a gift which attempt to impose restraints upon the power of alienation are void as against public policy. This is for the reason that it is among the attributes of ownership that the owner shall have power to sell and dispose of his property, and that it be liable to the claims of his creditors.

The right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple a condition against all alienation is void because repugnant to the estate devised.²⁹ For the same reason, a limitation over

24 Mo. 170, 69 Am. Dec. 422; *Dumey v. Sasse*, 24 Mo. 177; *Gaven v. Allen*, 100 Mo. 298, 13 S. W. 501; *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745; *Snider v. Newsom*, 24 Ga. 139; *Doyal v. Smith*, 28 Ga. 262; *Benton v. Benton*, 78 Kan. 373, 104 Pac. 856; *Id.*, 84 Kan. 691, 115 Pac. 535; *In re Poppleton's Estate*, 34 Utah, 285, 97 Pac. 138, 131 Am. St. Rep. 842; *Haring v. Shelton*, 103 Tex. 10, 122 S. W. 13; *Littler v. Dielmann*, 48 Tex. Civ. App. 392, 106 S. W. 1137.

Under a devise to a wife "so long as she remains my widow" with devise over of "what remains" upon her remarriage the widow may convey the fee simple. *Giles v. Little*, 104 U. S. 291, 26 L. Ed. 745 overruled: *Little v. Giles*, 25 Neb. 313, 41 N. W. 186 followed; *Roberts v. Lewis*, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747.

Devise to widow, limitation on remarriage she cannot exercise an express power of disposition fraudulently to defeat remainderman on her remarriage. *Littler v. Dielmann*, 48 Tex. Civ. App. 392, 106 S. W. 1137.

²⁹ *Potter v. Couch*, 141 U. S. 296-315, 11 Sup. Ct. 1005, 35 L. Ed. 721; *McDonogh v. Murdock*, 15 How. 367, 14 L. Ed. 732; *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394; *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295; *Peugnet v. Berthold*, 183 Mo. 61, 81 S. W. 874; *Wool v. Fleetwood*, 136 N. C. 460, 48 S. E. 785, 67 L. R. A. 444;

in case the first devisee shall alien is equally void, whether the estate be legal or equitable.³⁰

It seems, however, that an equitable estate or a life estate may be limited in any way that the testator may desire, and this upon the sound theory that the unrestricted fee is vested somewhere else.³¹

A testator may postpone the division of his estate for a reasonable time, and to that extent may restrict its alienation. In some states there is a statute to the effect that no partition of land shall be made contrary to the directions of a will.³² But

Gannon v. Pauk, 200 Mo. 87, 98 S. W. 471; *Freeman v. Phillips*, 113 Ga. 589, 38 S. E. 943; *Crumpler v. Barfield*, 114 Ga. 570, 40 S. E. 808; *Pratt v. Railroad*, 130 Mo. App. 175, 108 S. W. 1099; *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160.

Restraints on alienation. A foolish attempt to both give and withhold property from a legatee. *Evins v. Cawthon*, 132 Ala. 184, 31 South. 441.

A blundering decision upholding a restraint on alienation. *Hatcher v. Smith*, 103 Ga. 813, 31 S. E. 447.

³⁰ *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089; *Ware v. Cann*, 10 B. & C. 433; *Shaw v. Ford*, 7 Ch. D. 669; *In re Dugdale*, 38 Ch. D. 176; *Corbett v. Corbett*, 13 P. D. 136; *Steib v. Whitehead*, 111 Ill. 247; *Kelley v. Meins*, 135 Mass. 231; *Roosevelt v. Thurman*, 1 Johns. Ch. 220; *Mandlebaum v. McDonell*, 29 Mich. 78, 18 Am. Rep. 61; *Anderson v. Cary*, 36 Ohio St. 506, 38 Am. Rep. 602; *Twitty v. Camp*, 62 N. C. (Phil. Eq.) 61; *In re Rosher*, 26 Ch. D. 801.

³¹ *Woller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075; *Loosing v. Loosing*, 85 Neb. 66-75, 122 N. W. 707, 25 L. R. A. (N. S.) 920; *Trammell v. Johnston*, 54 Ga. 340; *Dulin v. Moore*, 96 Tex. 135, 70 S. W. 742.

Restraint on alienation even of a life estate is repugnant and void. *Sprinkle v. Leslie*, 36 Tex. Civ. App. 356, 81 S. W. 1018. This case is distinguished from those in which the restraint is necessary to the fulfillment of a trust.

³² *Cubbage v. Franklin*, 62 Mo. 364.

in order to effectuate such an intention to postpone the possession or division of the estate it seems to be necessary to vest the legal title in trustees.⁸³ Such an intention is usually incidental to a principal purpose to keep the estate intact during a life estate, or during the minority of one or more of the beneficiaries. If the beneficiaries are of full age, and take vested interests without any intermediate estate intervening, a mere arbitrary purpose to postpone the division or possession of the property has been held illegal.⁸⁴

When it is desired to tie up the property in such a manner that the income may be paid to a designated person regularly for his support while the principal itself is beyond his reach and beyond the

⁸³ *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094; *Toland v. Toland*, 123 Cal. 140, 55 Pac. 681; *Loomer v. Loomer*, 76 Conn. 522-527, 57 Atl. 167; *Mead v. Jennings*, 46 Mo. 91; *McQueen v. Lilly*, 131 Mo. 18, 31 S. W. 1043; *Stevens v. De La Vaulx*, 166 Mo. 20, 65 S. W. 1003; *McLeod v. Dell*, 9 Fla. 427-447; *Robinson v. Randolph*, 21 Fla. 629, 58 Am. Rep. 692.

A testatrix devised and bequeathed property to a trustee to be held in trust until her son should reach the age of 30 years, the income in the meantime to be paid to him, and the property to be then transferred to him. Held that the trust was lawful, and although there was no express restriction against alienation by the son of either the income or corpus of the property and no provision for contingent remainder in case he should not reach the age of 30, it was within the discretion of a court of equity to refuse to override the limitation of the will by terminating the trust before the stated time. *Stier v. Nashville Trust Co.*, 158 Fed. 601, 85 C. C. A. 423.

⁸⁴ *Dado v. Maguire*, 71 Mo. App. 641.

reach of his creditors, it is done by means of a *spendthrift trust*.

Property may be conveyed by will to trustees to pay over the income to a beneficiary, free from the claims of his creditors, and without power of alienation.³⁵

The law does not favor such an arrangement as this. No presumption is indulged in favor of a spendthrift trust, but if it is clearly expressed in the will it is valid.³⁶

³⁵ *Brooks v. Raynolds*, 59 Fed. 923, 8 C. C. A. 370; reversing (C. C.) 55 Fed. 783; *Seymour v. McAvoy*, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. 46; *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Montague v. Crane*, 12 Mo. App. 582; *Schoeneich v. Field*, 73 Mo. App. 452; *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968; *Guy v. Mayes*, 235 Mo. 390, 138 S. W. 510; *Sinnott v. Moore*, 113 Ga. 908, 39 S. E. 415; *In re Moore's Estate*, 198 Pa. 611, 48 Atl. 885; *Herring v. Patten*, 18 Tex. Civ. App. 147, 44 S. W. 50; *Patten v. Herring*, 9 Tex. Civ. App. 640, 29 S. W. 388.

An illustrative case on this subject is as follows: "A testator devised lands to a trustee for the use of his three sons, 'with power in my three sons to use and enjoy equally the rents, issues and profits thereof, during their natural lives,' his object being, 'to secure to my children a certain annual income beyond the accident of fortune or bad management on their part, and with this end in view to take away from them the power of disposing of the same, or of creating any liens thereon, or of making the same liable in any way for their debts.' It was held that it was the evident purpose of the testator to restrain the anticipation or alienation by the sons of the income of the realty, and that such restriction was a valid one." *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780, 2 L. R. A. 113, 9 Am. St. Rep. 358.

Not sufficient to create spendthrift trust. *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524; *Cornet v. Cornet*, 248 Mo. 184, 154 S. W. 121.

³⁶ *Partridge v. Cavender*, 96 Mo. 452, 9 S. W. 785; *Pickens v. Dorris*, 20 Mo. App. 1; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Spindle v. Shreve*, 111 U. S. 542, 4 Sup. Ct. 522, 28 L. Ed. 512; *Nichol v. Levy*, 5 Wall. 433, 18 L. Ed. 596; *Smith v. Moore*, 37 Ala.

In further aid of such a plan the testator may vest a discretion in the trustees to pay over to or withhold from the beneficiary any portion of the property, either for his support or otherwise. Such discretion in the trustees is incompatible with any vested interest of the beneficiary in any portion of the corpus within the reach of himself or his creditors during his lifetime,³⁷ although he may have a power of appointment of the estate or the fee may descend to his heirs.³⁸

327; *Jones v. Reese*, 65 Ala. 134; *Williams v. Robinson*, 16 Conn. 517; *McKinstler v. Smith*, 27 Conn. 628; *Croom v. Ocala P. & E. Co.*, 62 Fla. 460, 57 South. 243; *Heaton v. Dickson*, 153 Mo. App. 312, 133 S. W. 159; *Dunephant v. Dickson*, 153 Mo. App. 309, 133 S. W. 165.

Spendthrift trusts valid. *Shankland's Appeal*, 47 Pa. 113; *Smith v. Towers*, 69 Md. 77, 14 Atl. 497, 15 Atl. 92, 9 Am. St. Rep. 398; *Barnett's Appeal*, 46 Pa. 392, 86 Am. Dec. 502; *Broadway Nat. Bank v. Adams*, 133 Mass. 170, 43 Am. Rep. 504; *Nickell v. Handly*, 10 Grat. (Va.) 336; *Leavitt v. Beirne*, 21 Conn. 1; *Pope v. Elliott*, 8 B. Mon. (Ky.) 56; *Campbell v. Foster*, 35 N. Y. 361; *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719; *Barnes v. Dow*, 59 Vt. 530, 10 Atl. 258; *Thackara v. Mintzer*, 100 Pa. 151.

Attempt by spendthrift to create a trust for himself by deeding his share over to a trustee to manage for him defeated on the issue of fraud and undue influence. *Cornet v. Cornet*, 248 Mo. 184, 154 S. W. 121.

Spendthrift trust, subject to claims of wife and children. *Laws* Mo. 1913, p. 96.

³⁷ *Ballantine v. Ballantine* (C. C.) 152 Fed. 775; *Brooks v. Reynolds*, 59 Fed. 923, 8 C. C. A. 370; reversing (C. C.) 55 Fed. 783; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254; *Cutter v. Hardy*, 48 Cal. 568; *Seymour v. McAvoy*, 121 Cal. 438, 53 Pac. 946, 41 L. R. A. 544; *Holmes v. Bushnell*, 80 Conn. 233, 67 Atl. 479.

³⁸ *Bransfield v. Wigmore*, 80 Conn. 11, 66 Atl. 778; *Mason v. R. I. Hospital Tr. Co.*, 78 Conn. 81, 61 Atl. 57, 3 Ann. Cas. 586.

§ 137. Condition that devisee pay certain legacies or charges

The personal estate is the primary fund for the payment of legacies, but, either by express direction of the will or necessary implication therefrom, the legacies may sometimes be paid out of the realty. It is not intended to discuss the general subject at this point as it will be treated more fully under the heading of Distribution. It is intended to discuss here a devise of land upon condition that the devisee pay certain legacies or discharge certain obligations in respect of that devise. The phase of the subject here presented is one form of condition. A testator may annex a condition to a gift that the devisee pay certain legacies to other persons. This is a valid condition, and is often a very provident arrangement. If the devisee does not choose to take under the will he need not; but if he take the gift, he must do so with all the burdens the testator has seen fit to place upon it.

If the legacy is charged upon the land and its payment made a condition precedent to the right of the devisee to take the title the matter is very simple.³⁹ But if the legacy is to be paid or the obligation discharged in the future or as a condition subsequent the greatest confusion prevails by reason of the two different aspects in which the charge may be regarded.

³⁹ Broad's Estate, Myr. Prob. (Cal.) 188.

First: it may be treated as a personal liability on the devisee which he accepts by accepting the devise.

Second: it may be regarded as an equitable lien upon the land itself.

In some cases it has been treated as a personal liability,⁴⁰ in others as an equitable lien,⁴¹ and in still others as both.⁴²

The difference in legal effect between these propositions is very great, with a corresponding difference in the rights and remedies of the legatee.

When the legacy is held to be an equitable lien

⁴⁰ *Dunne v. Dunne*, 66 Cal. 157, 4 Pac. 441, 1152; *Williams v. Nichols*, 47 Ark. 254, 1 S. W. 243; *Millington v. Hill*, 47 Ark. 301, 1 S. W. 547; *Hunkypillar v. Harrison*, 59 Ark. 453, 27 S. W. 1004; *Alexander v. Alexander*, 156 Mo. 413, 57 S. W. 110; *Wood v. Ogden*, 121 Mo. App. 668, 97 S. W. 610.

Where legacy is made a charge on devisee only legatee entitled can enforce charge. *Lausman v. Drahos*, 12 Neb. 102, 10 N. W. 573.

Where the devisee of lands charged with the payment of legacies has a right under the terms of the will to discharge the legacies in land, he must exercise such right within a reasonable time, and his retention of the lands for twelve years is an election to pay the legacies in money, with interest. *Dunne v. Dunne*, 66 Cal. 157, 4 Pac. 441, 1152.

⁴¹ *Dudgeon v. Dudgeon*, 87 Mo. 218; *Bakert v. Bakert*, 86 Mo. App. 83; *Allison v. Chaney*, 63 Mo. 279; *Austin v. Watts*, 19 Mo. 293; *Brooks v. Eskins*, 24 Mo. App. 296; *French v. Mastin*, 19 Mo. App. 614; *Donohue v. Donohue*, 54 Kan. 136, 37 Pac. 998; *Dickinson v. Worthington* (C. C.) 10 Fed. 860; *Nichols v. Postlewaite*, 2 Dall. 131, 1 L. Ed. 319; *Cato v. Gentry*, 28 Ga. 327; *Palmer v. Simpson*, 69 Ga. 792; *Whittle v. Tarver*, 75 Ga. 818; *Bell v. Watkins*, 104 Ga. 345, 30 S. E. 756; *Prince v. Barrow*, 120 Ga. 810, 48 S. E. 412; *Jackson v. Phillips*, 57 Neb. 189, 77 N. W. 683.

⁴² *Keir v. Keir*, 155 Cal. 96, 99 Pac. 487.

on the land it follows the land in the possession of all subsequent purchasers. No matter how far in the future the legacy may be payable the legatee has always a perfect remedy to recover his legacy so far as the security of the land goes. On the other hand, if the legacy is a mere personal charge on the devisee the title to the land is free from any lien. The devisee may convey the fee; purchasers are not bound to see that the legacy is paid; and the only remedy of the legatee when payment accrues is to sue the devisee in *assumpsit*. Of course the legatee takes the hazard of continued financial responsibility of the devisee, with the result that the legatee frequently loses his legacy.

The courts have assumed to extract these diverse meanings from the accidental use or arrangement of the words of the testator in his will. With wholly unconscious humor they call this "construing the *intention* of the testator as expressed in the language of his will." This is in the very face of the fact that the testator rarely understands the legal effect of his language. Here again, as always in the construction of wills, the courts are adrift in an unknown sea, in a rudderless craft, without chart or compass. Shipwreck of the hopes and fortunes of litigants is the expected result and a safe landing a happy accident. Even so great a judge as Story has said:

A testator may devise lands with a view to legacies, and make them a charge on the land, or on the person of the devisee

or both; and whether a particular legacy be in either predicament must depend upon the language of the will. When, therefore, the testator orders legacies to be paid *out of* his lands, or where *subject* to legacies or *after* payment of legacies, he devises his lands, courts have held the land charged with the legacies upon the manifest intention of the testator. But here there is no such language. There is no direction that the devisee shall pay the legacies out of the land. The charge is personal and the case falls directly within the authority of *Reeves v. Gower*, 11 Mod. Rep. 208.⁴³

It is unfortunate that there cannot be a simple scientific rule on the subject founded upon the inherent nature of the gift. This is a very important question when the legacy is to be paid in the future; as, upon the marriage, death, or majority of a certain person; or is of a continuing nature, such as an annuity. The simplest rule would be that whenever a testator has imposed an obligation upon one of the beneficiaries in the same will in which he gives such beneficiary a portion of his estate, the obligation must be discharged out of the property thus given, and is an equitable lien on such property. What right has the testator to impose an obligation upon any one, unless he accompanies it with a gift of property out of which the obligation may be discharged? What right has the testator to impose a mere personal charge? The charge really rests upon the property given, and the devisee assumes it only when he accepts the property.

⁴³ *Wright v. Denn*, 10 Wheat. 204-226, 6 L. Ed. 303.

One of the useful and provident arrangements to which this form of devise can be put is to provide an annuity,⁴⁴ or for the support of children or aged persons.⁴⁵

On account of the needless confusion in which this subject is involved the draftsman of a will cannot be too careful in expressing plainly whether the charge is to be an equitable lien on the land or a personal charge on the devisee.

§ 138. Election

The general principle of election is frequently applied by courts of equity in cases of wills, and rests upon the obligation imposed upon one to choose between two inconsistent or alternative rights or claims in case there is a clear intention of the person from whom he derived one that he should not enjoy both.⁴⁶ Whoever accepts a benefit under

⁴⁴ *Waterfield v. Rice*, 111 Fed. 625, 49 C. C. A. 504; *Canal Bank v. Hudson*, 111 U. S. 66, 4 Sup. Ct. 303, 28 L. Ed. 354; *Estate of Haines*, 150 Cal. 640, 89 Pac. 606; *Peck v. Kinney*, 143 Fed. 76, 74 C. C. A. 270; *Ohio River R. Co. v. Fisher*, 115 Fed. 929, 53 C. C. A. 411.

⁴⁵ Devise subject to charge for support of another person. *Hunter v. Stembridge*, 12 Ga. 192; *Drane v. Beall*, 21 Ga. 21; *Tate v. Chandler*, 115 Ga. 462, 41 S. E. 647; *Rogers v. Highnote*, 126 Ga. 740, 56 S. E. 93; *Jamison v. May*, 13 Ark. 600; *Scott v. Logan*, 23 Ark. 351; *Cockrill v. Armstrong*, 31 Ark. 580; *Williams v. MacDougall*, 39 Cal. 80.

⁴⁶ *Graham v. Roseburgh*, 47 Mo. 111; *McKee v. Stuckey*, 181 Mo. 719, 81 S. W. 160; *Smithsonian Institution v. Meech*, 169 U. S. 398, 18 Sup. Ct. 396, 42 L. Ed. 793.

a will must conform to all its provisions and renounce any right inconsistent with them; he cannot claim both under and against the will.⁴⁷ Though a testator has no power to dispose of the property of another person by his will, still if he undertakes to do so and gives the true owner some bequest or devise under the same will, such person will be put to his election to take under the will, or renounce the will and stand on his legal rights.⁴⁸ He cannot do both.

The purpose of the testator to put the devisee to his election must appear from the will itself.⁴⁹ A testator is presumed not to have intended to devise property of which he had no power to dis-

⁴⁷ *Howze v. Davis*, 76 Ala. 381; *McCracken v. McBee*, 96 Ark. 251, 131 S. W. 450; *Adams v. Lansing*, 17 Cal. 629; *Hill v. Den*, 54 Cal. 6; *Jackson v. Bevins*, 74 Conn. 96, 49 Atl. 899; *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904; *Farmington Sav. Bank v. Curran*, 72 Conn. 342, 44 Atl. 473; *Paschal v. Acklin*, 27 Tex. 173; *Little v. Birdwell*, 27 Tex. 688; *Philleo v. Holliday*, 24 Tex. 38; *Sparks v. Dorrell*, 151 Mo. App. 173, 131 S. W. 761; *Lamar v. McLaren*, 107 Ga. 591, 34 S. E. 116; *Smith v. Butler*, 85 Tex. 126, 19 S. W. 1083; *Torno v. Torno*, 43 Tex. Civ. App. 117, 95 S. W. 762; *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075.

⁴⁸ *Fitzhugh v. Hubbard*, 41 Ark. 64; *Morrison v. Bowman*, 29 Cal. 337; *Noe v. Splivalo*, 54 Cal. 207; *Hurd v. Shelton*, 64 Conn. 496, 30 Atl. 766; *Farmington Sav. Bank v. Curran*, 72 Conn. 342, 44 Atl. 473; *Pemberton v. Pemberton*, 29 Mo. 408; *O'Reilly v. Nicholson*, 45 Mo. 164; *Pryor v. Pendleton*, 92 Tex. 384, 47 S. W. 706, 49 S. W. 212; *Murphy v. Sisters*, 43 Tex. Civ. App. 638, 97 S. W. 135.

⁴⁹ *Fitzhugh v. Hubbard*, 41 Ark. 64; *McDonald v. Shaw*, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 657; *Young v. McKinnie*, 5 Fla. 542; *Couts v. Holland*, 48 Tex. Civ. App. 476, 107 S. W. 913; *Smith v. Butler*, 85 Tex. 126, 19 S. W. 1083.

pose,⁵⁰ but a legatee is put to his election even though the testator was in error about the ownership of the property.⁵¹

As a general rule the legatee is not bound to elect until the condition and value of the property bequeathed to him is known.⁵² The essence of either an election or ratification is that it was done with full knowledge of the party's right.⁵³ But acts which indicate a choice of remedies must be held to be an election,⁵⁴ and such effect may follow from lapse of time and change in position of the parties.⁵⁵ The effect of the election to take under the will is to relinquish the title

⁵⁰ *In re Gilmore*, 81 Cal. 242, 22 Pac. 655; *Owen v. Tankersley*, 12 Tex. 405.

⁵¹ *McDonald v. Shaw*, 92 Ark. 15, 121 S. W. 935, 28 L. R. A. (N. S.) 857.

⁵² *Dunne v. Dunne*, 66 Cal. 159, 4 Pac. 441, 1152.

⁵³ *King v. La Grange*, 50 Cal. 328; *Estate of Thayer*, 142 Cal. 453, 76 Pac. 41; *Chapman v. Allen*, 56 Conn. 152, 14 Atl. 780; *Scoby v. Sweatt*, 28 Tex. 713.

A court of equity has power to elect for an infant legatee. *Swann v. Garrett*, 71 Ga. 566.

⁵⁴ *Smith v. Furnish*, 70 Cal. 424, 12 Pac. 392; *Clark v. Hershy*, 52 Ark. 473, 12 S. W. 1077; *Etcheborne v. Auzeais*, 45 Cal. 121; *Noe v. Splivalo*, 54 Cal. 207; *Byrn v. Kleas*, 15 Tex. Civ. App. 205, 39 S. W. 980; *Massie v. Massie*, 54 Tex. Civ. App. 617, 118 S. W. 219.

To constitute an election between a devise in a will and a right inconsistent therewith there must be an intention to make an election or some decisive act that will prevent restoring the parties affected to the same situation as if such act had not been performed. *Cobb v. Macfarland*, 87 Neb. 408, 127 N. W. 377; *Scoby v. Sweatt*, 28 Tex. 713.

⁵⁵ Election by taking benefits under the will becomes binding by lapse of time and change in position of parties. *Utermehle v. Norment*, 22 App. D. C. 31.

to the property given to others.⁵⁶ The doctrine of election does not apply to residuary legatees as such, but to specific legatees.⁵⁷

PROVISION FOR WIDOW OR WIDOWER

§ 139. Public policy limiting the testamentary power of married persons

A word should be said here in regard to limitations upon the power of testamentary disposition growing out of the marriage status. In all of the states the prevailing views of public policy are embodied in statutes which secure to the surviving spouse certain rights in the property of the other. These rights are, in effect, limitations upon the power of a married person to dispose of his property by will. The common law marital rights have been very generally modified, and in some states totally abolished. Statutory rights have been created in their place which approximate more nearly a fair uniformity of privilege between the husband and wife, and do not preponderate so tremendously in favor of the husband as did the common law. Some states have followed the plan of modifying and adding to the common law; others have taken the more radical step of repealing the common law rules and beginning the work of legislation from a new foundation. In certain states of the southwest the

⁵⁶ *Paulus v. Besch*, 127 Mo. App. 255, 104 S. W. 1149.

⁵⁷ *McGinnis v. McGinnis*, 1 Ga. 496.

theory of community property as known to the Spanish law is the basis of the marital rights of property.⁵⁸

The widow's dower and the widower's estate by the curtesy existed at common law and were independent of any disposition by the will. This is still true in states like Missouri, which have preserved these rights, though somewhat modified and added to by statute.⁵⁹ It was also the rule at common law that gifts and devises to the widow were presumed to be in addition to dower rights unless the contrary intention was clearly expressed, or necessarily implied in the will.⁶⁰ As to real property this presumption of the common law in favor of cumulative gifts is reversed

⁵⁸ Community property acquired by joint industry of husband and wife. *Schafer v. Ballou*, 35 Okl. 169, 128 Pac. 498; *Parker v. Parker*, 10 Tex. 83-97; *Henderson v. Ryan*, 27 Tex. 670.

By the Mexican law one-half interest in the community property vested in the wife upon the death of the husband and was not subject to his testamentary disposition. The same rule under California statute. *Scott v. Ward*, 13 Cal. 458; *Morrison v. Bowman*, 29 Cal. 337; *Gwin's Estate*, 77 Cal. 314, 19 Pac. 527; *Painter v. Painter*, 113 Cal. 371, 45 Pac. 689.

⁵⁹ *Gaster v. Estate of Gaster*, 92 Neb. 6, 137 N. W. 900; *Doyle v. Doyle*, 50 Ohio, 330, 34 N. E. 166; *In re Little's Estate*, 22 Utah, 204, 61 Pac. 899; *Stokes v. O'Fallon*, 2 Mo. 32; *Schorr v. Etling*, 124 Mo. 42, 27 S. W. 395. The wife cannot by will deprive her husband of his estate by the curtesy in her lands. *Soltan v. Soltan*, 93 Mo. 307, 6 S. W. 95; *Casler v. Gray*, 159 Mo. 588, 60 S. W. 1032; *Martin's Heirs v. Martin*, 22 Ala. 86; *Turner v. Cole*, 24 Ala. 364.

The wife may be willed what she would be entitled to under the law. *Tompkins v. Troy*, 130 Ala. 555, 30 South. 512.

⁶⁰ *Lord v. Lord*, 23 Conn. 327; *Bennett v. Packer*, 70 Conn. 357, 39 Atl. 739, 66 Am. St. Rep. 112; *Alling v. Chatfield*, 42 Conn. 276; *Evan's Appeal*, 51 Conn. 435; *Apperson v. Bolton*, 29 Ark. 418; *Sanders v. Wallace*, 118 Ala. 420, 24 South. 354; *Hilliard v. Binford*,

in England by the Act of Parliament,⁶¹ providing that the devise to the wife of any land, or any interest or estate therein, barred her dower unless a *contrary* intention appeared in the will. A similar statute has been adopted in some of the American states,⁶² but such a statute, being in derogation of the common law, cannot be extended by construction beyond its plain import. Therefore, as the Missouri statute only bars dower in lands of which the husband *died* seized, it does not apply to lands which he has aliened in his lifetime. As to such lands the common-law rule still applies,⁶³ nor will a bequest of personal property be construed to bar dower in real estate.⁶⁴

The object of the statute is not to reduce the widow's rights below what she would be entitled to at law, but simply to carry out the real intention of the testator by destroying the presumption in favor of cumulative gifts. Hence it is provided that the widow may renounce the provisions of the will at any time within

10 Ala. 977; *Reed v. Campbell*, 2 Hayw. & H. (D. C.) 417-419, Fed. Cas. No. 11,640a; *Thompson v. Betts*, 74 Conn. 576, 51 Atl. 564, 92 Am. St. Rep. 235; *Tooke v. Hardeman*, 7 Ga. 20; *Sparks v. Dorrell*, 151 Mo. App. 173, 131 S. W. 761.

Gifts held to be in lieu of dower. *Morris v. Morris' Ex'r*, 4 Houst. (Del.) 414-419; *Warren v. Morris*, 4 Del. Ch. 289; *Anthony v. Anthony*, 55 Conn. 256, 11 Atl. 45; *Gibbon v. Gibbon*, 40 Ga. 562.

⁶¹ 3 & 4 Wm. IV, c. 105, § 9, passed in 1833.

⁶² *Hilliard v. Binford*, 10 Ala. 977; *Sanders v. Wallace*, 118 Ala. 420, 24 South. 354; *Keed v. Campbell*, 2 Hayw. & H. (D. C.) 417-419, Fed. Cas. No. 11,640a.

⁶³ *Hall v. Smith*, 103 Mo. 289, 15 S. W. 621.

⁶⁴ *Halbert v. Halbert*, 19 Mo. 453; *Pemberton v. Pemberton*, 29 Mo. 408; *Ellis v. Ellis*, 119 Mo. App. 63, 96 S. W. 260.

twelve months and claim under the law, and having done so she is entitled either to dower (which is a life estate in one-third), or any interests which the law gives in lieu of dower.⁶⁵

The general policy of the American states has been to enlarge the rights of the widow in the estate of the deceased husband, especially where such additional rights would not affect the claims of descendants, but only those of collateral heirs or devisees.

§ 140. Widow's right of election

It seems, therefore, that the widow has by statute in some states, or by the general principle of election in others, the right to choose between the provisions made for her in her husband's will and the rights which the law gives her.⁶⁶ As to personal

⁶⁵ *Gant v. Henly*, 64 Mo. 162; *Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757; *Young v. Boardman*, 97 Mo. 181, 10 S. W. 48; *Matney v. Graham*, 50 Mo. 559.

⁶⁶ *Helm v. Leggett*, 66 Ark. 23, 48 S. W. 675; *Hawaiian Tr. Co. v. Van Holt*, 216 U. S. 367, 30 Sup. Ct. 303, 54 L. Ed. 519 (affirming 18 Hawaii, 340); *Stokes v. Pillow*, 64 Ark. 1, 40 S. W. 580; *Underground E. Ry. Co. v. Owsley* (C. C.) 169 Fed. 671; *Gilroy v. Richards*, 26 Tex. Civ. App. 355, 63 S. W. 664; *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117; *In re Little's Estate*, 22 Utah, 204-211, 61 Pac. 899.

"The wife has an interest in the estate of the husband of which he cannot deprive her by will or otherwise without her consent, and when he attempts to do so she has the right to elect whether she will take the provision made for her by the will or renounce it and hold such rights in his estate as the law gives her. She cannot claim a portion of the will and reject others, and claim under the statute. She must claim alone under the will or altogether independent of its provisions." *Lessley v. Lessley*, 44 Ill. 527; *Godman v. Converse*, 43 Neb. 463, 61 N. W. 756; *Stephenson v. Brown*, 4 N. J. Eq. 503;

property, and even as to real property in those states which have not adopted the Statute of Wm. IV, the presumption still is that gifts are cumulative. The wife is not required to elect unless required to do so by the terms of the will or by necessary inference from the inconsistent character of the gifts.⁶⁷

A husband has no power to dispose by will of the real or personal property which the statute allows to the widow as her absolute property. But he may do this, and put her to her election, whether to take under the will or under the law. This must be his clear intention, for the presumptions are all in her favor, and a provision in the will for the widow will never be construed by implication to be in lieu of her absolute interests so as to put her to her election.⁶⁸

Hyde v. Baldwin, 17 Pick. (Mass.) 303; *Smith v. Smith*, 14 Gray (Mass.) 532.

Wife may dissent from will. *Saxon v. Rawls*, 51 Fla. 555, 41 South. 594.

⁶⁷ *Gwin's Estate*, 77 Cal. 315, 19 Pac. 527; *In re Gilmore*, 81 Cal. 243, 22 Pac. 655; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Corker v. Corker*, 87 Cal. 647, 25 Pac. 922; *Carroll v. Carroll*, 20 Tex. 731; *Ashelford v. Chapman*, 81 Kan. 312, 105 Pac. 534; *Raines v. Corbin*, 24 Ga. 185; *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 50 S. W. 648; *St. Mary's O. A. v. Masterson*, 57 Tex. Civ. App. 646, 122 S. W. 587; *Estate of Cowell*, 164 Cal. 636, 130 Pac. 209; *Lee v. McFarland*, 19 Tex. Civ. App. 292, 46 S. W. 281; *Smith v. Butler*, 85 Tex. 126, 19 S. W. 1083; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520; *Godman v. Converse*, 43 Neb. 463, 61 N. W. 756 (overruling *Id.*, 38 Neb. 657, 57 N. W. 394); *McQueen v. Lilly*, 131 Mo. 9, 31 S. W. 1043; *Dudley v. Davenport*, 85 Mo. 462; *Perry v. Perryman*, 19 Mo. 469; *Bryant v. McCune*, 49 Mo. 546; *Kinsey v. Woodward*, 2 Del. Ch. 92; *Sparks v. Dorrell*, 151 Mo. App. 173, 131 S. W. 761; *Montgomery v. Brown*, 25 App. D. C. 490; *Sinnott v. Kenaday*, 14 App. D. C. 1; *Wells v. Petree*, 39 Tex. 419.

⁶⁸ *Hasenritter v. Hasenritter*, 77 Mo. 162; *Ball v. Ball*, 165 Mo. 312, 65 S. W. 552; *Schwatken v. Daudt*, 53 Mo. App. 1.

Unless otherwise provided by statute failure on the part of the widow to elect amounts to an election to take under the law.⁶⁹ In other words, in order to be bound by a bequest in the will in lieu of statutory rights she must elect to take under the will, or estop herself by her acts.⁷⁰ If the intention of the testator as expressed in the will is broad enough the widow may by accepting under the will lose not only her dower but her other rights in the estate.⁷¹

⁶⁹ *Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074; *Kinne v. Phares*, 79 Kan. 366, 100 Pac. 287; *Lish v. Lish*, 158 Mo. App. 400, 138 S. W. 558; *Forester v. Watford*, 67 Ga. 508; *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117.

⁷⁰ *Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. Rep. 566.

What amounts to an election to take under the will. *Pirtle v. Pirtle*, 84 Kan. 782, 115 Pac. 543; *Watts v. Baker*, 78 Ga. 622, 3 S. E. 773; *Zook v. Welty*, 156 Mo. App. 703, 137 S. W. 989; *Stoepler v. Silverberg*, 220 Mo. 258, 119 S. W. 418; *Churchill v. Bee*, 66 Ga. 621; *Johnston v. Duncan*, 67 Ga. 61; *Speer v. Speer*, 67 Ga. 1748; *Falligant v. Barrow*, 133 Ga. 87, 65 S. E. 149; *Wells v. Petree*, 39 Tex. 419; *Godman v. Converse*, 43 Neb. 463, 61 N. W. 756 (overruling *Id.* 38 Neb. 657, 57 N. W. 394); *Rogers v. Trevathan*, 67 Tex. 406, 3 S. W. 569; *In re Little's Estate*, 22 Utah, 204, 61 Pac. 899; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520.

Question of election is one of fact for the jury. *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117.

⁷¹ *Etcheborne v. Auzeais*, 45 Cal. 121; *Curtis v. Underwood*, 101 Cal. 661, 36 Pac. 110; *Lufkin's Estate*, 131 Cal. 291, 63 Pac. 469; *Goodwin v. Goodwin*, 33 Conn. 314; *Nelson v. Pomeroy*, 64 Conn. 257, 29 Atl. 534; *Walker v. Upson*, 74 Conn. 128, 49 Atl. 904; *Grant v. Stimpson*, 79 Conn. 617, 66 Atl. 166; *Harmon v. Harmon*, 80 Conn. 44, 66 Atl. 771; *Morrison v. Bowman*, 29 Cal. 337; *Stewart's Estate*, 74 Cal. 104, 15 Pac. 445.

§ 141. Equal division and community theory

In Kansas dower and curtesy are abolished,⁷² and the surviving husband or wife is entitled to one-half of the real and personal property of the deceased spouse. One spouse cannot by will deprive the other of this interest⁷³ unless consent in writing is had in accordance with the statute.⁷⁴ The same general rules prevail as to community property.⁷⁵

A testator must be presumed to know the law, that he has no power to dispose by will of his wife's inter-

⁷² *Crane v. Fipps*, 29 Kan. 585.

⁷³ *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Silvey's Estate*, 42 Cal. 210; *Hatch v. Ferguson* (C. C.) 57 Fed. 966; *Estate of Roach*, 159 Cal. 260, 113 Pac. 373; *Logan v. Logan*, 11 Colo. 47, 17 Pac. 99; *Mitchell v. Hughes*, 3 Colo. App. 43, 32 Pac. 185; *Brown v. Scherrer*, 5 Colo. App. 255, 38 Pac. 429; *Wilson v. Johnson*, 4 Kan. App. 747, 46 Pac. 833; *Carmen v. Kight*, 85 Kan. 18, 116 Pac. 231; *Williams v. Campbell*, 85 Kan. 631, 118 Pac. 1074.

⁷⁴ Section 2537, G. S. Kan. 1905; section 8704, G. S. Kan. 1905; *Comstock v. Adams*, 23 Kan. 513, 33 Am. Rep. 191; *Barry v. Barry*, 15 Kan. 587; *A., T. & S. F. Ry. v. Davenport*, 65 Kan. 206, 69 Pac. 195; *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815; *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232; *Gallon v. Haas*, 67 Kan. 225, 72 Pac. 770; *Cook v. Lawson*, 63 Kan. 854, 66 Pac. 1028. An antenuptial contract is a sufficient written consent. *Brown v. Weld*, 5 Kan. App. 341, 48 Pac. 456. Husband's consent to will cannot be revoked after wife's death. *Keeler v. Lauer*, 73 Kan. 396, 85 Pac. 541. Prior to 1868 a married woman could without her husband's consent devise away from him her entire estate. *Bennett v. Hutchinson*, 11 Kan. 398; *Neuber v. Shoel*, 8 Kan. App. 345, 55 Pac. 350; *Hanson v. Hanson*, 81 Kan. 305, 105 Pac. 444.

⁷⁵ *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Allardyce v. Hambleton*, 96 Tex. 30, 70 S. W. 76; *Conn v. Davis*, 33 Tex. 203; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 929; *Moss v. Helsley*, 60 Tex. 426.

est in the community property, and not to intend to devise any property over which he has no power of testamentary disposition. A general devise of all the property of which the testator may die possessed, without naming any specific property, applies only to his moiety of the community property.⁷⁶

It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome the presumptions against such a devise that the widow can be put to her election to take under the will, or to take what she is entitled to by law.⁷⁷

§ 142. Widower's share under statute

In most states the statute gives the widow or widower a share in the personal estate of the deceased spouse equal to a child's part,⁷⁸ and, in case the deceased left no child then one-half of the real and personal property.⁷⁹ While this is less than the husband was enti-

⁷⁶ Estate of Gilmore, 81 Cal. 240, 22 Pac. 655; Morrison v. Bowman, 29 Cal. 350; Silvey's Estate, 42 Cal. 210; In re Williamson, 75 Cal. 317, 17 Pac. 221.

⁷⁷ In re Gilmore, 81 Cal. 243, 22 Pac. 655; Stewart's Estate, 74 Cal. 101, 15 Pac. 445; Smith's Estate, 4 Cal. Unrep. Cas. 919, 38 Pac. 950; Estate of Gray, 159 Cal. 159, 112 Pac. 890.

⁷⁸ Bryant v. Christian, 58 Mo. 98.

⁷⁹ O'Brien v. Ash, 169 Mo. 283, 69 S. W. 8; Spurlock v. Burnett, 170 Mo. 372, 70 S. W. 870; Id., 183 Mo. 524, 81 S. W. 1221; Waters v. Herboth, 178 Mo. 166, 77 S. W. 305. Even a deed made in anticipation of death and in fraud of marital rights is void. Tucker v. Tucker, 29 Mo. 350; Id., 32 Mo. 464; Davis v. Davis, 5 Mo. 189; Stone v. Stone, 18 Mo. 389; Hornsey v. Casey, 21 Mo. 545; Straat v. O'Neil, 84 Mo. 68; Rice v. Waddill, 168 Mo. 99, 67 S. W. 605; Dyer v. Smith, 62 Mo. App. 606; Russell v. Andrews, 120 Ala. 222, 24 South. 573; Moore v. Herd, 76 Kan. 826, 93 Pac. 157; Ferguson

tled to at common law, yet the pendulum of legislative change at one time swung too far in favor of the wife, and the tendency now is to establish uniformity. These statutory interests cannot be taken away by will.⁸⁰ But the property must be of such nature that the husband would have had an interest in the absence of a will.⁸¹ In states where the community theory prevails, the right of the widower in the community property is equal to that of the wife.⁸²

§ 143. Right of election—How exercised

When the widow is put to her election whether she will take under the will or under the law such election must be made at the time and in the manner provided.⁸³ In the absence of such statutory provisions

v. Gentry, 206 Mo. 189, 104 S. W. 104; *Balster v. Cadick*, 29 App. D. C. 405.

⁸⁰ *In re Estate of O'Shea*, 85 Neb. 156, 122 N. W. 881.

⁸¹ *Register v. Elder*, 231 Mo. 321, 132 S. W. 699; *Jamison v. Zausch*, 227 Mo. 406, 126 S. W. 1023, 21 Ann. Cas. 1132.

⁸² *Wolfe v. Mueller*, 46 Colo. 335-339, 104 Pac. 487; *Lux's Estate*, 149 Cal. 200, 85 Pac. 147.

⁸³ *Sill v. Sill*, 31 Kan. 248, 1 Pac. 556; *James v. Dunstan*, 38 Kan. 289, 16 Pac. 459, 5 Am. St. Rep. 741; *Allen v. Hannum*, 15 Kan. 625; *Chandler v. Richardson*, 65 Kan. 152, 69 Pac. 168; *Estate of Vogt*, 154 Cal. 508, 98 Pac. 265; *Wolfe v. Mueller*, 46 Colo. 335, 104 Pac. 487; *Hanna v. Palmer*, 6 Colo. 156, 45 Am. Rep. 524; *Gwin's Estate*, 77 Cal. 313, 19 Pac. 527; *Green v. Green*, 7 Port. (Ala.) 19; *Hilliard v. Binford*, 10 Ala. 977; *Martin v. Martin*, 22 Ala. 86; *Vaughan v. Vaughan*, 30 Ala. 329; *Adams v. Adams*, 39 Ala. 278; *McGhee v. Stephens*, 83 Ala. 466, 3 South. 808; *Sanders v. Wallace*, 118 Ala. 418, 24 South. 354; *Spratt v. Lawson*, 176 Mo. 175, 75 S. W. 642.

Right of widow to elect under the statute is personal and does not pass on her death to her heirs or personal representatives. *Fergus*

as to the time and manner of election, or sometimes in the enforcement of such statutes the general principles of election are applied by the courts. Her election, when made, applies to all the provisions of the will. She cannot accept in part and repudiate in part.⁸⁴ She may lose her right to renounce the will and claim dower by acts amounting to estoppel in pais.⁸⁵

But in the absence of estoppel affecting the rights of third persons, the widow is treated with the greatest liberality. She has been permitted to withdraw,⁸⁶ or has been relieved in equity from an election improv-

v. Schioble, 91 Neb. 180, 135 N. W. 448; *Deutsch v. Rohlfing*, 22 Colo. App. 543, 126 Pac. 1123; *Fleming's Estate*, 217 Pa. 610, 66 Atl. 874, 11 L. R. A. (N. S.) 379, 118 Am. St. Rep. 900, 10 Ann. Cas. 826.

Insane wife—Election how made. *Schwartz v. West*, 37 Tex. Civ. App. 136, 84 S. W. 282; *Gaster v. Estate of Gaster*, 90 Neb. 529, 134 N. W. 235; *In re Estate of Manning*, 85 Neb. 60, 122 N. W. 711.

⁸⁴ *Nelson v. Lyster*, 32 Tex. Civ. App. 356, 74 S. W. 54; *Gilroy v. Richards*, 26 Tex. Civ. App. 355, 63 S. W. 664; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520; *Moss v. Helsley*, 60 Tex. 426.

And is binding upon her heirs. *Smith v. Butler*, 85 Tex. 126, 19 S. W. 1083.

⁸⁵ *Burroughs v. De Couits*, 70 Cal. 361, 11 Pac. 734; *Smith's Estate*, 4 Cal. Unrep. Cas. 919, 38 Pac. 950; *Warren v. Morris*, 4 Del. Ch. 289; *Morris v. Morris' Ex'r*, 4 Houst. (Del.) 414-419; *Lackland v. Stevenson*, 54 Mo. 108; *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522.

Contract between a widow and the executor and heirs not to prosecute litigation against the estate construed. *Owsley v. Yerkes*, 187 Fed. 560, 109 C. C. A. 250.

⁸⁶ *Evans' Appeal*, 51 Conn. 435.

If the bequests given the widow by her husband's will are less than would have been her statutory dower she is not estopped to renounce it by the fact that she, by writing endorsed on the will accepted the bequests in lieu of dower, or that after her husband's

idently made,⁸⁷ and generally no act of the widow which is not inconsistent with her status as widow, or which does not change the nature of the estate or prejudice the rights of other expectants will be treated as an election.⁸⁸ Nor does her election to take under the will estop her from insisting on a proper interpre-

death she received part of the bequests and retained them. The only acceptance that will estop her is one that operates to the injury of others.

The husband's right to make a will is qualified by the widow's right to make her election within twelve months and no number of acceptances if without consideration will prevent her renouncing it. *Spratt v. Lawson*, 176 Mo. 175, 75 S. W. 642.

Where a will contains a devise to a widow in lieu of dower under the statute, no acceptance of the devise is required; if nothing is done within a year after probate, the law presumes her acceptance. As the law does not provide for acceptance such acceptance or election if made would amount to nothing, and she may, within the year reject the will, notwithstanding, even though the will requires an "acceptance." *Bretz v. Matney*, 60 Mo. 444.

⁸⁷ *Eddy v. Eddy*, 168 Fed. 590, 93 C. C. A. 586; *Green v. Saulsbury*, 6 Del. Ch. 371, 33 Atl. 623.

Written consent of wife to husband's will may be set aside if improperly obtained. *Weisner v. Weisner*, 89 Kan. 352, 131 Pac. 608.

An election or estoppel of the widow by acquiescence in the provisions of the will must be made with full knowledge. *Tooke v. Hardeman*, 7 Ga. 20; *Johnston v. Duncan*, 67 Ga. 61.

⁸⁸ *Silvey's Estate*, 42 Cal. 210; *Mumford's Estate*, Myr. Prob. (Cal.) 133; *King v. Lagrange*, 50 Cal. 328; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Smith's Estate*, 108 Cal. 115, 40 Pac. 1037; *Dunphy's Estate*, 147 Cal. 95, 81 Pac. 315; *Gwin's Estate*, 77 Cal. 314, 19 Pac. 527; *Egger v. Egger*, 225 Mo. 116, 123 S. W. 928, 135 Am. St. Rep. 566; *Benedict v. Wilmarth*, 46 Fla. 535, 35 South. 84, 4 Ann. Cas. 1033; *Carroll v. Carroll*, 20 Tex. 731.

Antenuptial contract to accept specified provision in will of husband in lieu of dower does not bar wife from renouncing will and claiming dower. *Fellers v. Fellers*, 54 Neb. 694, 74 N. W. 1077.

tation of its terms,⁸⁹ nor bar her from her share of undisposed of property.⁹⁰

As to real property the right of election is governed by the *lex rei sitæ*,⁹¹ and as to personal estate usually it is confined to domestic wills.⁹²

§ 144. Effect of election on rights of others

The renunciation of the widow changes the provisions of the will *pro tanto* only.⁹³ Where a widow elects to take under the law of descents and distributions such election does not render the will inoperative. As between other persons the will will be enforced as near in accordance with the intention of the testator as it can be,⁹⁴ unless this would make impos-

⁸⁹ While the election of the widow to take under the will estops her from denying the validity of the instrument as a will, it cannot estop her from insisting upon a proper interpretation of the instrument nor from questioning the validity of trusts attempted to be created thereby. *In re Walkerly*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; *Rucker v. Maddox*, 114 Ga. 899, 41 S. E. 68.

⁹⁰ *McDougald v. Gilchrist*, 20 Fla. 573; *Philleo v. Holliday*, 24 Tex. 38.

⁹¹ *Apperson v. Bolton*, 29 Ark. 418.

⁹² *Waterfield v. Rice*, 111 Fed. 625, 49 C. C. A. 504; *Rannels v. Rowe*, 166 Fed. 425, 92 C. C. A. 177.

Surviving husband who elects to take under will in state of domicile will be held to such election in other states. *Martin v. Battey*, 87 Kan. 582, 125 Pac. 88, Ann. Cas. 1914A, 440.

⁹³ *Delaney's Estate*, 49 Cal. 76.

⁹⁴ *Pittman v. Pittman*, 81 Kan. 643, 107 Pac. 235, 27 L. R. A. (N. S.) 602; *Allen v. Hannum*, 15 Kan. 625; *Latta v. Brown*, 96 Tenn. 343, 34 S. W. 417, 31 L. R. A. 840; *Jones' Adm'r v. Knappen*, 63 Vt. 391, 22 Atl. 630, 14 L. R. A. 293; *Fennell v. Fennell*, 81 Kan. 642, 106 Pac. 1038; *In re Little's Estate*, 22 Utah, 204-215, 61 Pac. 899; *Gullet v. Farley*, 164 Ill. 566, 45 N. E. 972; *In re Estate of Davis*, 36 Iowa, 24; *Smith v. Baldwin*, 2 Ind. 404.

sible the scheme of the will.⁹⁵ A devisee who loses by the widow renouncing the provisions of the will and taking dower out of the property devised to him should be entitled to claim compensation out of the property so renounced by the widow.⁹⁶ Where the widow elects to take under the will, or to accept any estate which is not exempt by law from the payment of debts, she takes subject to the usual rights of creditors.⁹⁷

§ 144a. Homestead and other statutory rights

We have seen that dower and curtesy, where they exist, and such absolute interests as are given by statute to one spouse in the property of the other, cannot be defeated by will. There are two other rights, commonly provided by statute, which are for the benefit of the family and beyond the power of the individual to affect by will. One is the homestead right:⁹⁸ the

⁹⁵ *Fennell v. Fennell*, 80 Kan. 730, 106 Pac. 1038, 18 Ann. Cas. 471.

⁹⁶ *Snead v. Shreve*, 31 Mo. 416.

⁹⁷ *Gaunt v. Tucker's Ex'r*, 18 Ala. 27; *Hanna v. Palmer*, 6 Colo. 156, 45 Am. Rep. 524; *Wickersham's Estate*, 138 Cal. 355, 70 Pac. 1079.

⁹⁸ Section 3616, R. S. Mo. 1899; *Blandy v. Asher*, 72 Mo. 27; *Bogart v. Bogart*, 138 Mo. 427, 40 S. W. 91; *Anthony v. Rice*, 110 Mo. 223, 19 S. W. 423; *Rockhey v. Rockhey*, 97 Mo. 76, 11 S. W. 225; *Kleimann v. Gieselmann*, 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761; *Kaes v. Gross*, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767; *Schneider v. Hoffmann*, 9 Mo. App. 280; *Ball v. Ball*, 165 Mo. 312, 65 S. W. 552; *Schorr v. Etling*, 124 Mo. 42, 27 S. W. 395; *Skouten v. Wood*, 57 Mo. 380; *Burgess v. Bowles*, 99 Mo. 543, 12 S. W. 341, 13 S. W. 99; section 2522, G. S. Kan. 1905; *Martindale v. Smith*, 31 Kan. 270, 1 Pac. 569; *Vining v. Willis*, 40 Kan. 612, 20 Pac. 232; *Cross v. Benson*, 68 Kan. 496, 75 Pac. 558, 64 L. R. A. 560; *Matheny's*

other is an allowance of household goods, money or provisions for the immediate support of the wife and family. This latter usually comprises the same property that is exempt from execution for debts.⁹⁹

Estate, 121 Cal. 267, 53 Pac. 800; *Akin v. Geiger*, 52 Ga. 407; *Palmer v. Palmer*, 47 Fla. 200, 35 South. 983; *Scull v. Beatty*, 27 Fla. 426, 9 South. 4; *Walker v. Redding*, 40 Fla. 124, 23 South. 565; *Brichacek v. Brichacek*, 75 Neb. 417, 106 N. W. 473; *McCormick v. McNeel*, 53 Tex. 15.

Deed construed testamentary in effect, so far as to take the place of widow's claim for homestead. *Woodall v. Rudd*, 41 Tex. 375.

Homestead may not be partitioned even under terms of will. *Hudgins v. Sansom*, 72 Tex. 229, 10 S. W. 104.

⁹⁹ *Bryant v. McCune*, 49 Mo. 546; *Register v. Hensley*, 70 Mo. 189; *In re Klostermann*, 6 Mo. App. 314; *Dobson v. Butler*, 17 Mo. 87; *Weindel v. Weindel*, 126 Mo. 640, 29 S. W. 715; *Isham Austin's Estate*, 73 Mo. App. 61; *King v. King*, 64 Mo. App. 301; *Campbell v. Whitsett*, 66 Mo. App. 444; *Griswold v. Mattix*, 21 Mo. App. 282; *Hastings v. Myers*, 21 Mo. 519; *Cummings v. Cummings*, 51 Mo. 261; *Hasenritter v. Hasenritter*, 77 Mo. 162; *Whaley v. Whaley*, 50 Mo. 577; *Handlin v. Morgan Co.*, 57 Mo. 114; *Cross v. Benson*, 68 Kan. 495, 75 Pac. 558, 64 L. R. A. 560; *Sulzberger v. Sulzberger*, 50 Cal. 385; *Edenfield v. Edenfield*, 131 Ga. 571, 62 S. E. 980; *Reynolds v. Norwell*, 129 Ga. 512, 59 S. E. 299; *Woolley v. Sullivan*, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629; *Baker v. Baker*, 57 Wis. 382, 15 N. W. 425; *Estate of Cowell*, 164 Cal. 636, 130 Pac. 209.

CHAPTER X

QUANTITY OF ESTATE

- § 145. When a legacy or devise vests—Meaning of term “vested.”
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- 147. Rules for determining vesting of future estates in remainder.
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WHEN A LEGACY OR DEVISE VESTS

§ 145. Meaning of term “vested”

A title is said to be “vested” when the person entitled has a fixed interest in a definite piece of property or fund, which, unless specially restrained, is clothed

with all the attributes of ownership, i. e., passes to his heirs in case of his death, is liable to his debts and engagements, may be conveyed, charged and devised by him, etc.¹

The term "vested" is not confined to legal estates. It embraces equitable estates, but sub modo only, that is, subject to the terms of the trust.² A vested estate may be not only in possession but in remainder or in reversion: it may be not only in severalty but in joint tenancy, coparcenary or common. It is the antithesis of a contingent interest, or one depending upon a condition, an executory devise or a mere expectancy.

Where the words of the will provide for simple legacies or devises without any conditions or provisions for future estates or for the postponement of enjoyment or distribution there is little difficulty in as-

¹ *Wiess v. Goodhue*, 98 Tex. 274, 33 S. W. 178; *Johnson v. Wash. L. & T. Co.*, 33 App. D. C. 242; *Id.*, 224 U. S. 224, 32 Sup. Ct. 421, 56 L. Ed. 741.

Vested interest may be assigned, mortgaged, conveyed or devised. *Inglis v. Inglis*, 2 Dall. 45, 1 L. Ed. 282; *Acree v. Dabney*, 133 Ala. 437, 32 South. 127; *Dunn v. Schell*, 122 Cal. 626, 55 Pac. 595; *Williams v. Robinson*, 16 Conn. 523; *Cross v. Robinson*, 21 Conn. 384; *Hauptman v. Carpenter*, 16 App. D. C. 524; *Crossley v. Leslie*, 130 Ga. 782, 61 S. E. 851, 14 Ann. Cas. 703.

The title of a devisee is derived from the will and does not vest until the testator's death. *Jones v. Shomaker*, 41 Fla. 232, 26 South. 191.

Interests of remaindermen vest on death of testator and do not lapse on their death before the life tenant, but descend to their heirs. *Bufford v. Holliman*, 10 Tex. 560, 60 Am. Dec. 223; *Tillson v. Holloway*, 90 Neb. 481, 134 N. W. 232, Ann. Cas. 1913B, 78.

² *Canfield v. Canfield*, 118 Fed. 1, 55 C. C. A. 169; *Shackley v. Homer*, 87 Neb. 146, 127 N. W. 145.

certaining when the various gifts vest in the beneficiaries.

The *personal* estate vests in the first instance in the executor for the payment of debts and legacies. Until administration is had and the debts are paid, it does not appear how much or what property is available for the payment of general or residuary bequests. Such bequests do not vest in the legatee until the executor gives his consent.³ In the case of devises of land and specific legacies of personal property, the title generally vests at the death of the testator, subject to be taken if necessary for the payment of debts.⁴ This subject will be taken up more fully when we discuss Distribution.

³ Ames v. Scudder, 83 Mo. 189, affirming, 11 Mo. App. 168. Though a legatee has an inchoate title to the subject of the bequest to him, even before administration. Boeger v. Langenberg, 42 Mo. App. 13.

And may force an executor to give his consent. Dado v. Maguire, 71 Mo. App. 641.

⁴ Hamilton v. Lewis, 13 Mo. 184; Thomas v. Thomas, 149 Mo. 433, 51 S. W. 111, 73 Am. St. Rep. 405; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Scott v. Ware, 65 Ala. 174; Woodruff v. Hinson, 68 Ala. 368; Vail v. Vail, 49 Conn. 56; Newberry v. Hinman, 49 Conn. 132; Johnes v. Beers, 57 Conn. 303, 18 Atl. 100, 14 Am. St. Rep. 101; Lepard v. Skinner, 58 Conn. 330, 20 Atl. 427; Young v. McKinnie, 5 Fla. 542; Gairdner v. Tate, 110 Ga. 456, 35 S. E. 697.

§ 146. Difficulty in determining when an estate is vested

The difficulties which arise in determining the vesting of titles under a will may be grouped roughly into two general classes:

First: Those cases in which the testator has created some form of future estate.

Second: Those in which he has postponed the possession or enjoyment of his gifts or the distribution of his estate.

Here, as elsewhere in the construction of wills, the intention of the testator is the pole star of construction. It is not possible to reconcile all the decided cases, but courts attempt to aid themselves by certain general principles. The law favors the vesting of estates,⁵ and will incline in doubtful cases to construe a

⁵ Price v. Watkins, 1 Dall. 8, 1 L. Ed. 14; Jones v. Habersham, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; Johnson v. Wash. L. & T. Co., 224 U. S. 224, 32 Sup. Ct. 421, 56 L. Ed. 741 (affirming 33 App. D. C. 242); Partee v. Thomas (C. C.) 11 Fed. 769; Walker v. Atmore, 50 Fed. 644, 1 C. C. A. 595 (affirming [C. C.] 46 Fed. 429); Savage v. Benham, 17 Ala. 119; High v. Worley, 32 Ala. 709; Foster v. Holland, 56 Ala. 474; Phinizy v. Foster, 90 Ala. 262, 7 South. 836; Bethea v. Bethea, 116 Ala. 265, 22 South. 561; Campbell v. Weakley, 121 Ala. 64, 25 South. 694; Andrews v. Russell, 127 Ala. 195, 28 South. 703; Stakely v. Pres. Church, 145 Ala. 379, 39 South. 653; Crawford v. Engram, 153 Ala. 420, 45 South. 584; Newberry v. Hinman, 49 Conn. 130; Farnam v. Farnam, 53 Conn. 278, 2 Atl. 325, 5 Atl. 682; Johns v. Beers, 57 Conn. 295, 18 Atl. 100, 14 Am. St. Rep. 101; Lepard v. Skinner, 58 Conn. 329, 20 Atl. 427; Harrison v. Moore, 64 Conn. 348, 30 Atl. 55; Cody v. Staples, 80 Conn. 82, 67 Atl. 1; Morton Tr. Co. v. Chittenden, 81 Conn. 105, 70 Atl. 648; Collier's Will, 40 Mo. 321; Chew v. Keller, 100 Mo. 362, 13 S. W. 395; Bunting v. Speak, 41 Kan. 424, 21 Pac. 288, 3 L. R. A. 690; McLaughlin v. Penney, 65 Kan. 523,

devise or legacy as vested rather than contingent. This rule is greatly strengthened by the modern presumption against intestacy.⁶

Even where there is some contingency or condition attached to the gift the estate will be held to vest at the earliest possible moment.⁷

70 Pac. 341; *Dickerson v. Dickerson*, 211 Mo. 483, 110 S. W. 700; *Bailey v. Ross*, 66 Ga. 354, 364; *Sumpter v. Carter*, 115 Ga. 893, 42 S. E. 324, 60 L. R. A. 274; *Ligwin v. McRee*, 79 Ga. 430, 4 S. E. 863; *Green v. Gordon*, 38 App. D. C. 443; *In re De Vries*, 17 Cal. App. 184, 119 Pac. 109; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524.

⁶ *Anthony v. Anthony*, 55 Conn. 256, 11 Atl. 45.

⁷ *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Carver v. Jackson*, 4 Pet. 1, 7 L. Ed. 761; *Gregory v. Welch*, 90 Ark. 152, 118 S. W. 404; *Taber v. Packwood*, 2 Day (Conn.) 52; *Cody v. Staples*, 80 Conn. 82, 67 Atl. 1; *Carpenter v. Perkins*, 83 Conn. 11, 74 Atl. 1062; *Craig v. Rowland*, 10 App. D. C. 402-415; *Jossey v. Brown*, 119 Ga. 758, 47 S. E. 350; *Robinson v. Hillman*, 36 App. D. C. 576; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211.

The existence of a power of sale or a power of appointment in the life tenant will not affect the vesting of the remainder. *In re Wood* (D. C.) 98 Fed. 972; *Thorington v. Thorington*, 111 Ala. 237, 20 South. 407, 36 L. R. A. 385.

Vested interest, notwithstanding discretion of testamentary trustee to make unequal distribution. *Albert v. Sanford*, 201 Mo. 117-129, 99 S. W. 1068.

Legacy to be paid when executrix "thinks prudent" is absolute and must be paid in a reasonable time. *Claxton v. Weeks*, 21 Ga. 265.

After a remainder becomes vested it cannot be affected or disposed of by any act of the life tenant. *Craig v. Rowland*, 10 App. D. C. 402; *Marshall v. Augusta*, 5 App. D. C. 183; *Pryor v. Winter*, 147 Cal. 554, 82 Pac. 202, 109 Am. St. Rep. 162; *Blakeslee v. Pardee*, 76 Conn. 263, 56 Atl. 503.

The particular estate which is void may also carry down with it vested remainders dependent thereon. *In re Walkerly*, 108 Cal. 627-649, 41 Pac. 772, 49 Am. St. Rep. 97.

Vested remainder, subject to be divested if devisee die before death

§ 147. Rules for determining vesting of future estates in remainder

Future estates in remainder are vested or contingent according to the fixed rules of the common law.

A remainder is vested, when there is some person in esse known and ascertained, who by the instrument creating the estate is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat; but the remainder is contingent when it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all.⁸

of life tenant. *McDonald v. Taylor*, 107 Ga. 43, 32 S. E. 879; *Bowman v. Long*, 23 Ga. 242.

⁸ *Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415; *Smaw v. Young*, 109 Ala. 529, 20 South. 370; *Moody v. Walker*, 3 Ark. 147; *Vogt v. Vogt*, 26 App. D. C. 46; *In re De Vries*, 17 Cal. App. 184, 119 Pac. 109; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120.

Remainders held to be vested. *Frey v. Thompson*, 66 Ala. 287; *Smith v. Chadwick*, 111 Ala. 542, 20 South. 436; *Wright v. Gooden*, 6 Houst. (Del.) 397; *Austin v. Bristol*, 40 Conn. 120, 16 Am. Rep. 23; *Heberton v. McClain* (C. C.) 135 Fed. 226; *Perkins v. Gibbs*, 153 Fed. 952, 83 C. C. A. 68; *Ward v. Sage*, 185 Fed. 7, 108 C. C. A. 413; *Beer v. Moffatt* (D. C.) 192 Fed. 984; *Muenter v. Union Tr. Co.*, 195 Fed. 480, 115 C. C. A. 390; *Kumpe v. Coons*, 63 Ala. 448; *Smith v. Chadwick*, 111 Ala. 542, 20 South. 436; *Bethea v. Bethea*, 116 Ala. 265, 22 South. 561; *Andrews v. Russell*, 127 Ala. 195, 28 South. 703; *West v. Williams*, 15 Ark. 682; *Gregory v. Welch*, 90 Ark. 152, 118 S. W. 404; *Campbell's Estate*, 149 Cal. 712, 87 Pac. 573; *Selna's Estate*, Myr. Prob. (Cal.) 233; *Phillips v. Phillips*, 19 Ga. 261, 65 Am. Dec. 591; *Clauton v. Estes*, 77 Ga. 352, 1 S. E. 163; *Lufburrow v. Koch*, 75 Ga. 448; *Nelson v. Nelson*, 73 Ga. 133; *Toombs v. Spratlin*, 127 Ga. 766, 57 S. E. 59; *Dickinson v. Holden*, 134 Ga. 813, 68 S. E. 728; *Williams v. Lob-*

Where the intention of the testator as expressed in his will is uncertain, and the question involved is whether the will creates a vested or contingent remainder, the following rules of construction will be applied:

1. The law will not construe a remainder to be contingent when it can be taken as vested.

2. Estates shall be held to vest at the earliest possible period unless there is a clear manifestation of the intention of the testator to the contrary.

3. Adverbs of time as "when," "then," "after," "from," etc., in a devise of a remainder are construed

ban, 206 Mo. 399, 104 S. W. 58; *Stoepler v. Silverberg*, 220 Mo. 258, 119 S. W. 418; *Landram v. Jordan*, 25 App. D. C. 291; *Breneman v. Herdman*, 35 App. D. C. 27; *In re De Vries*, 17 Cal. App. 184, 119 Pac. 109.

Remainders held contingent, not vested. *In re Gardner* (D. C.) 106 Fed. 670; *In re Hoadley* (D. C.) 101 Fed. 233; *In re Ehle* (D. C.) 109 Fed. 625; *Ward v. Ward* (C. C.) 131 Fed. 946; *Casey v. Sherwood* (C. C.) 193 Fed. 290; *Terrell v. Reeves*, 103 Ala. 264, 16 South. 54; *Rosenau v. Childress*, 111 Ala. 214, 20 South. 95; *Dickerson v. Dickerson*, 211 Mo. 483, 110 S. W. 700; *Lich v. Lich*, 158 Mo. App. 400, 138 S. W. 558; *Sullivan v. Garesche*, 229 Mo. 496, 129 S. W. 949, 49 L. R. A. (N. S.) 605; *Mattox v. Deadwyler*, 130 Ga. 461, 60 S. E. 1066; *Darnell v. Barton*, 75 Ga. 377; *Watson v. Adams*, 103 Ga. 733, 30 S. E. 577; *Case v. Haggerty*, 91 Neb. 746, 137 N. W. 979; *Marsh v. Marsh*, 92 Neb. 189-196, 137 N. W. 1122; *Chace v. Gregg*, 88 Tex. 552, 32 S. W. 520; *Lee v. McFarland*, 19 Tex. Civ. App. 292, 46 S. W. 281.

"Vested contingent remainder" whatever that is! *Beckley v. Lefingwell*, 57 Conn. 163, 17 Atl. 766.

A contingent remainder in realty when the contingency is not as to the person but as to the event is devisable. *Morse v. Proper*, 82 Ga. 13, 8 S. E. 625; *Collins v. Smith*, 105 Ga. 525-528, 31 S. E. 449; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404.

to relate merely to the time of the enjoyment of the estate, and not the time of vesting.⁹

Words of survivorship usually apply to death of testator and persons then answering description take vested remainder,¹⁰ unless the will shows a different intent.¹¹

If the persons who are to take in remainder cannot be identified until the termination of the particular estate the remainder is contingent.¹² The rule is that a devise over on failure of the event indicates an intention to create a contingent estate.¹³

⁹ *Johnson v. Wash. L. & T. Co.*, 33 App. D. C. 242.

Vested distinguished from contingent. *Green v. Gordon*, 38 App. D. C. 443; *Bufford v. Holliman*, 10 Tex. 560-572, 60 Am. Dec. 223; *Moore v. Lyons*, 25 Wend. (N. Y.) 119.

¹⁰ *Crossley v. Leslie*, 130 Ga. 782, 61 S. E. 851, 14 Ann. Cas. 703; *Hulburt v. Emerson*, 16 Mass. 241; *Hansford v. Elliott*, 9 Leigh (Va.) 79; *Moore v. Lyons*, 25 Wend. (N. Y.) 120; *Slack v. Page*, 23 N. J. Eq. 238; *Clanton v. Estes*, 77 Ga. 352, 1 S. E. 163; *Hudgens v. Wilkins*, 77 Ga. 555; *Gwinn v. Taylor*, 134 Ga. 783, 68 S. E. 508; *Phinizy v. Wallace*, 136 Ga. 520-524, 71 S. E. 896; *Olmstead v. Dunn*, 72 Ga. 850.

¹¹ *Dickerson v. Dickerson*, 211 Mo. 483, 110 S. W. 700; *Smith v. Joyner*, 136 Ga. 755, 72 S. E. 40.

¹² *Hartford Tr. Co. v. Wolcott*, 85 Conn. 134, 81 Atl. 1057; *Bristol v. Atwater*, 50 Conn. 402; *Cropley v. Cooper*, 7 D. C. 226; *Phinizy v. Foster*, 90 Ala. 262, 7 South. 836; *Ballentine v. Foster*, 128 Ala. 638, 30 South. 481; *Vanzant v. Morris*, 25 Ala. 285.

¹³ *Estate of Blake*, 157 Cal. 448, 108 Pac. 287.

In a Pennsylvania case held that a trust for a daughter for life, with remainder to the issue of her body, and if she left no issue, then to the residuary estate, created no vested interest in the children of the daughter except on the condition of their surviving her, following *Wallace v. Denig*, 152 Pa. 251, 25 Atl. 534; *Wilson v. Denig*, 166 Pa. 29, 30 Atl. 1025; *Buchanan v. Denig* (C. C.) 84 Fed. 863.

§ 148. Remainders to a class—When vested

The rules as to remainders to a class, as "children," "issue," "heirs," etc., after the termination of a particular estate has been thus stated:

If there are words of present gift in remainder to a class of persons in existence, the remainder is vested, though it cannot be ascertained until the determination of the particular estate who will ultimately take;¹⁴ but if futurity attaches to the gift, so that it is not intended to take effect until the determination of the particular estate, the remainder to a class of persons then existing is contingent.¹⁵

The devise of a life estate with a limitation over to the children of a person living at the death of the testator gives all the children then living a vested remainder, which opens to let in after-born children.¹⁶

¹⁴ *Allen v. Claybrook*, 58 Mo. 124; *Thomas v. Thomas*, 149 Mo. 426, 51 S. W. 111, 73 Am. St. Rep. 405; *Doerner v. Doerner*, 161 Mo. 399, 61 S. W. 801; *Carter v. Long*, 181 Mo. 701, 81 S. W. 162; *McGinnis v. Foster*, 4 Ga. 377.

¹⁵ *Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415; *Tirrell v. Bacon* (C. C.) 3 Fed. 62-64.

¹⁶ *Tirrell v. Bacon* (C. C. Mass.) 3 Fed. 62-64; *Dingley v. Dingley*, 5 Mass. 535; *Weston v. Foster*, 7 Metc. (Mass.) 297; *Cruit v. Owen*, 25 App. D. C. 514; *Olmstead v. Dunn*, 72 Ga. 850; *Irvin v. Porterfield*, 126 Ga. 729, 55 S. E. 946; *Toole v. Perry*, 80 Ga. 681, 7 S. E. 118; *Williamson v. Berry*, 8 How. 495, 12 L. Ed. 1170.

Remainder may vest in unborn child. *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97.

For the Mexican and early Texas law forbidding future estates see *Bufford v. Holliman*, 10 Tex. 560-571, 60 Am. Dec. 223.

§ 149. Postponement of possession or enjoyment

The foregoing embrace those cases in which the testator has carved out a particular estate followed by a remainder vested or contingent.

The second class of cases are those in which the testator, without any intervening particular estate, has sought to postpone the possession or enjoyment of the gifts, or the distribution of the property. This grows out of the latitude permitted to testators: putting their *intentions* in the place of established rules governing the devolution of titles. Necessarily it introduces a perplexing element of vagueness. On the one side is the rule, which is more than a rule—a scientific fact—that the entire fee must pass out of the testator at the moment of his death and vest immediately in some living person. This fee title may be split up into any number of particular estates, estates in remainder, reversion, legal or equitable, upon condition or executory devise; but taken altogether it must constitute a fee simple, as the segments constitute a circle. It must all vest in some living person or persons. The ultimate fee cannot remain in abeyance nor in the lifeless clay of the testator. This has led the courts to adopt either the pure fiction of law that the fee descends to the heirs at law until such time as the testator's dead hand takes it away from them, or to lean toward the more modern and common sense view that the fee vests in the devisees at the death of the testator and that the possession and enjoyment only is postponed. In the case of pure-

ly personal property the executors may be treated as the depositories of the empty title as the heirs at law are in the case of real estate.¹⁷

In some cases the question whether the gift be vested or contingent has been solved by the accidental use of words in the will:

It is a settled rule in the jurisprudence of England, adopted from the civil law, that where a legacy is given to a person "as," "if," "when," or "provided" he arrives at a certain age, or "at" that time, and there is no other controlling evidence of intention, the legacy is contingent.¹⁸

In other cases a solution has been attempted by considering the nature and purpose of the gift, and the reason for the postponement if it can be gathered from the will. Thus it has been held that a legacy in the form of a direction to pay or to pay and divide at a future period vests immediately if the payment be postponed for the convenience of the estate or to let in some other interest.¹⁹ Where the postponement has relation to the personal status of the legatee, as that he must comply with some condition or reach a cer-

¹⁷ Postponement viewed as restraint or alienation. *Estate of Young*, 123 Cal. 337-346, 55 Pac. 1011; *In re Walkerly*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; *Hone v. Van Schaick*, 20 Wend. (N. Y.) 568; *Oxley v. Lane*, 35 N. Y. 350.

¹⁸ *Colt v. Hubbard*, 33 Conn. 281; *Marr's Ex'r v. McCullough*, 6 Port. (Ala.) 507; *Ingersol v. Ingersol*, 77 Conn. 408-410, 59 Atl. 413; *Allen v. Whitaker*, 34 Ga. 6; *Paterson v. Ellis*, 11 Wend. (N. Y.) 259; *Taylor v. Meador*, 66 Ga. 230; *Campbell v. Robertson*, 62 Ga. 709; *Dameron v. Lanyon*, 234 Mo. 627, 138 S. W. 1.

¹⁹ *Rubencane v. McKee*, 6 Del. Ch. 40, 6 Atl. 639; *Paterson v. Ellis*, 11 Wend. (N. Y.) 259.

tain age before he receives the gift, it has been held contingent.

But even in this case the rule is that the gift of the income in the meantime or any provision for support or education of the legatee out of the property pending his arrival at the required age indicate an intention that he shall have the property in any event and the legacy will be vested.²⁰

All of these rules must yield to the plain language of the will making the gift contingent.²¹

The presumption in favor of vesting however, resolves all doubts in favor of the legatee and unless the gift is clearly contingent it will be held to be vested from the death of the testator even though the possession or enjoyment be postponed.²²

²⁰ Estate of Blake, 157 Cal. 448, 108 Pac. 287; *Lenox v. Lenox Ex'r*, 1 Hayw. & H. (D. C.) 11, Fed. Cas. No. 8,246a; *Frost v. McCaulley*, 7 Del. Ch. 162, 44 Atl. 779; *Paterson v. Ellis*, 11 Wend. (N. Y.) 259; *Pearce v. Lott*, 101 Ga. 395, 29 S. E. 276; *Young v. McKinnie*, 5 Fla. 542; *Everett v. Mount*, 22 Ga. 323.

Application of legacy to legatees benefit before time for payment fixed by the will is within discretion of chancellor. *Blackburn v. Hawkins*, 6 Ark. 50.

²¹ *Owen v. Eaton*, 56 Mo. App. 563; *Woolverton v. Johnson*, 69 Kan. 708, 77 Pac. 559; *Cropley v. Cooper*, 7 D. C. 226-237; *Andrews v. Rice*, 53 Conn. 566, 5 Atl. 823; Estate of Blake, 157 Cal. 448, 108 Pac. 287; *Rogers Estate*, 94 Cal. 526, 29 Pac. 962; *Hill v. Hill*, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198.

Where legacies are contingent only those legatees living at the happening of the contingency on which the division was to take place were entitled to share in the estate. *Travis v. Morrison*, 28 Ala. 494; *Phinizy v. Foster*, 90 Ala. 262, 7 South. 836.

²² *Byrne v. France*, 131 Mo. 639, 33 S. W. 178; *Dado v. Maguire*, 71 Mo. App. 641; *Collier's Will*, 40 Mo. 287; *Overton v. Davy*, 20 Mo. 273;

Where words of contingency or condition are used which may be construed as applying either to the gift itself or to the time of payment, courts are inclined to construe them as applying to the time of payment, and to hold the gift vested rather than contingent.²³

Goodwin v. Goodwin, 69 Mo. 617; Jones v. Waters, 17 Mo. 587; McLaughlin v. Penny, 65 Kan. 523, 70 Pac. 341; McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; Kerlin v. Bull, 1 Dall. 175, 1 L. Ed. 88; Gregg v. Bethea, 6 Port. (Ala.) 9; Cox v. McKinney, 32 Ala. 461; Thrasher v. Ingram, 32 Ala. 645; Higgins v. Waller, 57 Ala. 396; Kumpe v. Coons, 63 Ala. 448; Gibson v. Land, 27 Ala. 117; Hunter v. Green, 22 Ala. 329; Andrews v. Russell, 127 Ala. 195, 28 South. 703; Moody v. Walker, 3 Ark. 147; Blackburn v. Hawkins, 6 Ark. 50; Watkins v. Quarles, 23 Ark. 179; Scott v. Logan, 23 Ark. 351; Cockrill v. Armstrong, 31 Ark. 580; Wyman v. Johnson, 68 Ark. 369, 59 S. W. 250; Fitch v. Miller, 20 Cal. 352; Williams v. Williams, 73 Cal. 99, 14 Pac. 394; Estate of Campbell, 149 Cal. 712, 87 Pac. 573; Newlove v. Merc. Tr. Co., 156 Cal. 657, 105 Pac. 971; Higgins v. Waller, 57 Ala. 400; Doe v. Considine, 6 Wall. 458, 18 L. Ed. 869; Cowles v. Cowles, 56 Conn. 248, 13 Atl. 414; Harrison v. Moore, 64 Conn. 348, 30 Atl. 55; Conwell's Admr. v. Heavilo, 5 Har. (Del.) 296; Richardson v. Raughley, 1 Houst. (Del.) 561; Estate of Young, 123 Cal. 337, 53 Pac. 1011; Hall v. David, 67 Ga. 72; Daniel v. Duncan, 33 Ga. Supp. 29; Lich v. Lich, 158 Mo. App. 400, 138 S. W. 558; Richardson v. Penicks, 1 App. D. C. 261; Earnshaw v. Daly, 1 App. D. C. 218; Paterson v. Ellis, 11 Wend. 259; In re Estate of Willets, 88 Neb. 805, 130 N. W. 757, 33 L. R. A. (N. S.) 321; Lacey v. Floyd, 99 Tex. 112, 87 S. W. 665.

A court of competent jurisdiction may determine the existence, extent and proper distribution of vested interests, even though the possession and enjoyment are deferred. Colt v. Colt, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. Ed. 520.

²³ Dale v. White, 33 Conn. 294.

§ 150. What words necessary to devise a fee

It is an established rule of the common law that a devise of lands without words of limitation confers an estate for life only. But because this rule generally defeats the intention of the testator the courts have been astute in finding exceptions to it.²⁴

The rule has been very generally changed by statute and modified by decisions and overlaid by exceptions until now it may be said to be the general rule that a devise of lands, unless specially limited to a less estate will convey a fee or whatever estate the testator had power to convey.²⁵

²⁴ *King v. Ackerman*, 2 Black, 408, 17 L. Ed. 292; *Lambert v. Paine*, 3 Cranch, 97, 2 L. Ed. 377; *Conoway v. Piper*, 3 Har. (Del.) 482; *Harrington v. Roe*, 1 Houst. (Del.) 398; *McCaffrey v. Little*, 20 App. D. C. 116-121; *Young v. Norris Peters Co.*, 27 App. D. C. 140; *Atkins v. Best*, 27 App. D. C. 148; *McCaffrey v. Manogue*, 22 App. D. C. 385; *Colliers Case*, 6 Coke, 16; *Wright v. Page*, 10 Wheat. 203-231, 6 L. Ed. 303-310; *Abbott v. Essex Co.*, 18 How. 202-215, 15 L. Ed. 352-356; *McAleer v. Schneider*, 2 App. D. C. 461.

²⁵ *Hungerford v. Anderson*, 4 Day (Conn.) 368; *Holmes v. Williams*, 1 Root (Conn.) 341, 1 Am. Dec. 49; *White v. White*, 52 Conn. 520; *Evans Appeal*, 51 Conn. 437; *Donovan's Lessees v. Donovan*, 4 Har. (Del.) 177; *Whorton v. Moragne*, 62 Ala. 201; *Smith v. Greer*, 88 Ala. 414, 6 South. 911; *Holt v. Pickett*, 111 Ala. 362, 20 South. 432; *Cain v. Cain*, 127 Ala. 440, 29 South. 846; *Estate of Claiborne*, 158 Cal. 646, 112 Pac. 278; *Trimble v. Hensley*, 10 Mo. 309; *Simmons v. Cabanne*, 177 Mo. 336, 76 S. W. 618; *Jackson v. Coggin*, 29 Ga. 403; *Edwards v. Worley*, 70 Ga. 667; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Holt v. Wilson*, 82 Kan. 268-271, 108 Pac. 87; *May v. S. A. & A. P. T. S. Co.*, 83 Tex. 502, 18 S. W. 959; *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160.

The words "heirs and assigns," while not necessary to convey a fee in a will, are proper to indicate such purpose. *Jackson v. Littell*, 213 Mo. 590, 112 S. W. 53, 127 Am. St. Rep. 620; *Pratt v. Railroad*,

A devise with a general power of disposal is a fee.²⁶ The absence of a limitation over indicates an intention to devise a fee,²⁷ and so does the imposition by the testator of a charge upon the estate devised.²⁸ The devise of a fee may be implied from a gift of the "rents and profits"²⁹ or the "avails"³⁰ of land.

130 Mo. App. 175, 108 S. W. 1099; *Galloway v. Darby*, 105 Ark. 558, 151 S. W. 1014, 44 L. R. A. (N. S.) 782.

Devise carries whatever interest the testator may have in the land. *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219.

Will will pass real estate held adversely. *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617.

A general devise of lands *prima facie* includes those mortgaged. *Drane v. Gunter*, 19 Ala. 731.

Emblements pass with a devise of the land. *Pratte v. Coffman*, 27 Mo. 424.

If there is more land than the testator contemplated it should be divided equally. *Porter v. Gaines*, 151 Mo. 560, 52 S. W. 376.

²⁶ *Alford v. Alford*, 56 Ala. 350; *Bolman v. Lohman*, 79 Ala. 63; *Hood v. Branlett*, 105 Ala. 660, 17 South. 105; *Smith v. Phillips*, 131 Ala. 629, 30 South. 872; *Hull v. Culver*, 34 Conn. 404; *Green v. Sutton*, 50 Mo. 186; *Cook v. Couch*, 100 Mo. 29, 13 S. W. 80; *Tisdale v. Prather*, 210 Mo. 402, 109 S. W. 41.

Express estate for life, with unlimited power of disposal, is enlarged into a fee by Alabama statute as to creditors and purchasers. *Alford v. Alford*, 56 Ala. 350; *Bolman v. Lohman*, 79 Ala. 63.

²⁷ *Hysmith v. Patton*, 72 Ark. 296, 80 S. W. 151; *Hamilton v. Downs*, 33 Conn. 211; *Smith v. Johnson*, 21 Ga. 386.

²⁸ *Harrington v. Roe*, 1 Houst. (Del.) 398; *Judd v. Bushnell*, 7 Conn. 211; *McRee's Adm'r v. Means*, 34 Ala. 349.

Charge of pecuniary legacies upon remainder does not raise it from a conditional to an absolute fee. *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926.

²⁹ *Green v. Biddle*, 8 Wheat. 1-76, 5 L. Ed. 547; *Stein v. Gordon*, 92 Ala. 532, 9 South. 741; *Pournell v. Harris*, 29 Ga. 736; *Bonner v. Hastey*, 90 Ga. 208, 15 S. E. 777; *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203, 79 S. W. 831; *Battey v. Battey*, 94 Neb. 729, 144 N. W. 786.

³⁰ *Ingersol v. Knowlton*, 15 Conn. 468; *Snyder v. Baker*, 16 D. C. 443; *Hill v. Clark*, 48 Ga. 526.

§ 151. Absolute estate not cut down by inference

An estate once granted absolutely in fee will not be cut down by inference or by limitations contained in subsequent parts of a will, unless the intent to limit the devise is manifested clearly and unmistakably; if the expression relied upon as a limitation be doubtful, the doubt will be resolved in favor of the absolute estate.³¹ But if the granting clause is indefinite and uncertain as to the estate devised, subsequent provisions may be referred to for the purpose of determining it.³²

³¹ *McClellan v. Mackenzie*, 126 Fed. 701, 61 C. C. A. 619; *Toms v. Owen* (C. C.) 52 Fed. 417; *Wellford v. Snyder*, 137 U. S. 521, 11 Sup. Ct. 183; 34 L. Ed. 780; *Fanning v. Main*, 77 Conn. 94, 58 Atl. 472; *Browning v. Southworth*, 71 Conn. 224, 41 Atl. 768; *Bishop v. Selleck*, 1 Day (Conn.) 299; *Korn v. Cutler*, 26 Conn. 6; *Hughes v. Knowlton*, 37 Conn. 431; *Phelps v. Bates*, 54 Conn. 13, 5 Atl. 301, 1 Am. St. Rep. 92; *Webb v. Lines*, 57 Conn. 156, 17 Atl. 90; *Pitts v. Campbell*, 173 Ala. 604, 55 South. 500; *Ladd's Estate*, 94 Cal. 670, 30 Pac. 99; *Marti's Estate*, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; *Granniss' Estate*, 142 Cal. 1, 75 Pac. 324; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Roth v. Rauschenbusch*, 173 Mo. 582, 73 S. W. 664, 61 L. R. A. 455; *Balliett v. Veal*, 140 Mo. 187, 41 S. W. 736; *Small v. Field*, 102 Mo. 104, 14 S. W. 815; *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *Brooks v. Brooks*, 187 Mo. 476, 86 S. W. 158; *Gannon v. Pauk*, 200 Mo. 94, 98 S. W. 471; *Boston S. D. Co. v. Stich*, 61 Kan. 474, 59 Pac. 1082; *Tisdale v. Prather*, 210 Mo. 402, 109 S. W. 41; *Jackson v. Littell*, 213 Mo. 589, 112 S. W. 53, 127 Am. St. Rep. 620; *Lawless v. Kerns*, 242 Mo. 392, 146 S. W. 1169; *Cornet v. Cornet*, 248 Mo. 184, 154 S. W. 121; *Holt v. Wilson*, 82 Kan. 268, 108 Pac. 87; *Byrnes v. Stilwell*, 103 N. Y. 453, 9 N. E. 241, 57 Am. Rep. 760; *Thomas v. Owens*, 131 Ga. 248, 62 S. E. 218; *Wood v. Owen*, 133 Ga. 751, 66 S. E. 951; *Montgomery v. Brown*, 25 App. D. C. 490.

³² *John H Estate v. Brown*, 201 Fed. 224, 119 C. C. A. 458 (H. T.); *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047.

Whenever it is the clear intention of a testator that the devisee shall have an absolute property in the estate devised, a limitation over, being inconsistent with the absolute property intended to be conveyed, cannot be enforced.³³

§ 152. Devise of life estate

By appropriate words, the testator may show that nothing more than a life estate was intended to be given,³⁴ especially if a remainder is given to others.³⁵

A gift may be a life estate if so expressed, even though there is no disposition of the fee of real estate

³³ *Speairs v. Ligon*, 59 Tex. 233; *Gifford v. Choate*, 100 Mass. 346; *Ide v. Ide*, 5 Mass. 500; *Bamforth v. Bamforth*, 123 Mass. 280; *Gibbins v. Shepard*, 125 Mass. 543; *Jones v. Bacon*, 68 Me. 36, 28 Am. Rep. 1; *Montgomery v. Brown*, 25 App. D. C. 490.

³⁴ *Chiles v. Bartleson*, 21 Mo. 344; *Jourden v. Meier*, 31 Mo. 40; *Richardson v. Richardson*, 49 Mo. 29; *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786; *Talbott v. Hamill*, 151 Mo. 292, 52 S. W. 203; *Forest Oil Co. v. Crawford*, 77 Fed. 106, 23 C. C. A. 55; *Bernal v. Wade*, 46 Cal. 663; *Hollister v. Shaw*, 46 Conn. 256; *Webb v. Goodnough*, 53 Conn. 218, 1 Atl. 797; *Security Co. v. Hardenburgh*, 53 Conn. 171-174, 2 Atl. 391; *Thaw v. Ritchie*, 15 D. C. 347; *McCaffrey v. Manogue*, 22 App. D. C. 385; *Broach v. Kitchens*, 23 Ga. 515; *Jossey v. White*, 28 Ga. 265.

A gift may be for the joint lives of two or more persons. *Riordon v. Holiday*, 8 Ga. 79.

Rights of life tenant. *Wiley v. Wiley*, 1 Neb. (Unof.) 350, 95 N. W. 702.

Life estate not implied from a provision that trustee shall manage estate during devisee's life. *Ford v. Gill*, 109 Ga. 691, 35 S. E. 156.

³⁵ *Thaw v. Ritchie*, 136 U. S. 519, 10 Sup. Ct. 1037, 34 L. Ed. 531; *Henry v. Pittsburgh Clay Mfg. Co.*, 80 Fed. 485, 25 C. C. A. 581; *Ballantine v. Ballantine (C. C.)* 152 Fed. 775; *O'Connor v. Rowland*, 73 Ark. 422, 84 S. W. 472; *Clarke v. Terry*, 34 Conn. 177; *Stone v. McEckron*, 57 Conn. 194, 17 Atl. 852; *Bartlett v. Sears*, 81

or the corpus of personal estate.³⁶ In this case the fee falls into the residuary estate or passes as in case of intestacy.³⁷

It may be provided that a life estate may be enlarged into a fee upon the happening of a particular event,³⁸ but if a life estate only is expressly given, such estate will not be converted into a fee by mere words of implication.³⁹

Conn. 34, 70 Atl. 33; *Goss v. Eberhart*, 29 Ga. 545; *Woodruff v. Woodruff*, 32 Ga. 358; *Holt v. Bowman*, 33 Ga. Supp. 129; *Jones v. Crawley*, 68 Ga. 175; *Ford v. Cook*, 73 Ga. 215; *Goodrich v. Pearce*, 83 Ga. 781, 10 S. E. 451; *Lohmuller v. Mosher*, 74 Kan. 751, 87 Pac. 1140, 11 Ann. Cas. 469; *Rooney v. Hurlbut*, 79 Kan. 231, 98 Pac. 765; *Brooks v. Evetts*, 33 Tex. 732; *John H Estate v. Brown*, 201 Fed. 224, 119 C. C. A. 458 (H. T.).

³⁶ *Evan's Appeal*, 51 Conn. 435; *Schorr v. Carter*, 120 Mo. 409, 25 S. W. 538.

³⁷ *Byrne v. McGrath*, 130 Cal. 316, 62 Pac. 559, 80 Am. St. Rep. 127; *Estate of Reinhardt*, 74 Cal. 365, 16 Pac. 13; *Schimpf v. Rhodewald*, 62 Neb. 105, 86 N. W. 908.

Devisee of life estate may also be heir of undisposed of fee and thus effect a merger of whole title. *Wilder v. Holland*, 102 Ga. 44, 29 S. E. 134; *Smith v. Moore*, 129 Ga. 644, 59 S. E. 915.

³⁸ *Turney v. Sparks*, 88 Mo. App. 363; *Shriver v. Lynn*, 2 How. 43, 11 L. Ed. 172.

³⁹ *Douglass v. Sharp*, 52 Ark. 113, 12 S. W. 202; *Coleman v. Camp*, 36 Ala. 159; *Gregory v. Cowgill*, 19 Mo. 415; *Swearingen v. Taylor*, 14 Mo. 391; *Kimbrough v. Smith*, 128 Ga. 690, 58 S. E. 23.

§ 153. Powers, general and special, of life tenant

A life estate may be joined with a power of sale⁴⁰ or a power of consumption or disposal of the property⁴¹ either generally, or limited to a particular purpose.

The power of sale given to a life tenant means the power to convey a fee.⁴² He has, by the modern rule, the power to convey his life estate without express power. At common law, if the life tenant in the absence of an express power of sale, undertook to convey a fee he forfeited his life estate.

⁴⁰ *Hazel v. Hagan*, 47 Mo. 277; *Gaven v. Allen*, 100 Mo. 297, 13 S. W. 501; *Greffet v. Willman*, 114 Mo. 106, 21 S. W. 481; *McMillan v. Farrow*, 141 Mo. 55, 41 S. W. 890; *Grace v. Perry*, 197 Mo. 550, 95 S. W. 875, 7 Ann. Cas. 948; *Worden v. Perry*, 197 Mo. 569, 95 S. W. 880; *Mollencamp v. Farr*, 70 Kan. 786, 79 Pac. 646; *Keely v. Weir* (C. C.) 38 Fed. 291; *Cain v. Cain*, 127 Ala. 440, 29 South. 846; *Norris v. Harris*, 15 Cal. 226; *Wood v. Amidon*, 2 MacArthur (D. C.) 224.

⁴¹ *Smith v. Beardsley*, 51 Fed. 122, 2 C. C. A. 118; *Smith v. McIntyre*, 95 Fed. 585, 37 C. C. A. 177; *Bilger v. Nunan*, 199 Fed. 549, 118 C. C. A. 23; *Patty v. Goolsby*, 51 Ark. 61, 9 S. W. 846; *Watson v. Watson*, 21 Tex. Civ. App. 348, 51 S. W. 1105; *Davis v. Kirksey*, 14 Tex. Civ. App. 380, 37 S. W. 994; *Lesiur v. Sipherd*, 84 Neb. 296, 121 N. W. 104; *Cox v. Wills*, 49 N. J. Eq. 130, 22 Atl. 794; *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527; *In re Estate of Schuck*, 87 Neb. 46, 126 N. W. 652.

Power of appointment by will. *Maltby's Appeal*, 47 Conn. 349; *Hollister v. Shaw*, 46 Conn. 248; *New v. Potts*, 55 Ga. 420; *Dixon v. Dixon*, 85 Kan. 379, 116 Pac. 886; *Wimberly v. Barley*, 58 Tex. 222; *Lawless v. Kerns*, 242 Mo. 392, 146 S. W. 1169; *Weir v. Smith*, 62 Tex. 1.

⁴² *Lewis v. Palmer*, 46 Conn. 459; *State v. Smith*, 52 Conn. 562; *Security Co. v. Pratt*, 65 Conn. 161, 32 Atl. 396; *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752; *Griffin v. Nicholas*, 224 Mo. 275, 123 S. W. 1063; *Mayo v. Harrison*, 134 Ga. 737, 68 S. E. 497.

The American rule is that a conveyance, by a tenant for life, of an estate in fee simple, does not operate as a forfeiture of the life estate, nor affect the interest of remaindermen, but simply passes such estate as the grantor had and could lawfully convey, and is void as to the residue.⁴³

The life tenant cannot affect the estate of the remainderman, as the latter does not take through the life tenant, but directly from the testator.⁴⁴ But the life tenant may release or convey to the remainderman, thus effecting a merger which will extinguish all particular estates and powers.⁴⁵

⁴³ *Rogers v. Moore*, 11 Conn. 553.

⁴⁴ *Elam v. Parkhill*, 60 Tex. 581; *Creditors of Spicer v. Spicer*, 21 Ga. 200; *Dupon v. Walden*, 84 Ga. 690, 11 S. E. 451; *Taylor v. Kemp*, 86 Ga. 181, 12 S. E. 296; *Am. Mtg. Co. v. Hill*, 92 Ga. 297, 18 S. E. 425; *Lampkin v. Hayden*, 99 Ga. 363, 27 S. E. 764; *Cochran v. Cochran*, 43 Tex. Civ. App. 259, 95 S. W. 731; *Heady v. Crouse*, 203 Mo. 100-119, 100 S. W. 1052, 120 Am. St. Rep. 643; *Schimpf v. Rhodewald*, 62 Neb. 105, 86 N. W. 908.

Possession by life tenant or those that claim under him is not adverse to remaindermen. *Peck v. Ayres*, 79 Kan. 457, 100 Pac. 283.

⁴⁵ *Rakestraw v. Rakestraw*, 70 Ga. 806; *Rosier v. Nichols*, 123 Ga. 20, 50 S. E. 988.

Remaindermen if sui juris may ratify illegal sale by trustee and life tenant. *Hicks v. Webb*, 127 Ga. 170, 56 S. E. 307.

No merger here. *Toombs v. Spratlin*, 127 Ga. 766, 57 S. E. 59.

§ 154. Life estate with power of disposition

The power of disposition does not enlarge an express life estate into a fee, either absolute or qualified.⁴⁶ The power does not generally arise from implication.⁴⁷ It must be expressly given and is usually

⁴⁶ *Denson v. Mitchell*, 26 Ala. 360; *Dryer v. Crawford*, 90 Ala. 131, 7 South. 445; *Morffew v. S. F. & S. R. R. Co.*, 107 Cal. 587, 40 Pac. 810; *Lewis v. Palmer*, 46 Conn. 454; *Tolland Co. Ins. Co. v. Underwood*, 50 Conn. 493; *Glover v. Stillson*, 56 Conn. 316, 15 Atl. 752; *Peckham v. Lego*, 57 Conn. 553, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130; *Hull v. Holloway*, 58 Conn. 210, 20 Atl. 445; *Sill v. White*, 62 Conn. 434, 26 Atl. 396, 20 L. R. A. 321; *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112; *Norcum v. D'Oench*, 17 Mo. 98; *Gregory v. Cowgill*, 19 Mo. 415; *Turner v. Timberlake*, 53 Mo. 375; *Bryant v. Christian*, 58 Mo. 98; *Carr v. Dings*, 58 Mo. 400; *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Russell v. Eubanks*, 84 Mo. 82; *Corby v. Corby*, 85 Mo. 371; *Harbison v. James*, 90 Mo. 411, 2 S. W. 292; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *Redman v. Barger*, 118 Mo. 568, 24 S. W. 177; *Evans v. Folks*, 135 Mo. 397, 37 S. W. 126; *Burford v. Aldridge*, 165 Mo. 419, 63 S. W. 101, 65 S. W. 716; *Underwood v. Cave*, 176 Mo. 1, 75 S. W. 451; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Haralson v. Redd*, 15 Ga. 148; *Porter v. Thomas*, 23 Ga. 467; *Hollingshed v. Alston*, 13 Ga. 277; *Kennedy v. Alexander*, 21 App. D. C. 424; *Wetter v. Walker*, 62 Ga. 142; *Burleigh v. Clough*, 52 N. H. 267, 13 Am. Rep. 23; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. 365; *Swarthout v. Ranier*, 143 N. Y. 499, 38 N. E. 726; *Ramsdell v. Ramsdell*, 21 Me. 288; *Wood v. Robertson*, 113 Ind. 323; 15 N. E. 457; *Armor v. Frey*, 226 Mo. 646, 126 S. W. 483; *Romjue v. Randolph*, 166 Mo. App. 87, 148 S. W. 185; *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920; *Weir v. Smith*, 62 Tex. 1.

⁴⁷ *Bramell v. Cole*, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619; *Bramell v. Adams*, 146 Mo. 70, 47 S. W. 931; *Foote v. Sanders*, . Mo. 616; *Glore v. Scroggins*, 124 Ga. 922, 53 S. E. 690.

A devise to the wife, "to have and to hold during her life, and to do with as she sees proper before her death," vests a life estate only in the wife and does not authorize her to convey the fee. *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326, 23 L. Ed. 927.

construed strictly.⁴⁸ It is limited, for the protection of the remainderman, to the purpose for which it was given.⁴⁹

Where the life tenant is given the power of sale, "for his support" or for his "maintenance" he cannot exercise the power unless it was in fact necessary.⁵⁰ The language conferring the power may be so broad as to repose some discretion in the donee of the power so that in the absence of bad faith or abuse of the power he cannot be called to account.⁵¹ But in no case

⁴⁸ *Downie v. Downie* (C. C.) 4 Fed. 55; *Bilger v. Nunan* (C. C.) 186 Fed. 665; *State v. Smith*, 52 Conn. 557; *Harp v. Wallin*, 93 Ga. 811, 20 S. E. 966; *N. E. Mtg. Sec. Co. v. Buice*, 98 Ga. 795, 26 S. E. 84.

Power of disposition given by the will to the wife, the life tenant, by name without any mention of her as executrix until the closing paragraph of the will, vests in her as an individual, and not as executrix. *Smith v. McIntyre*, 95 Fed. 585, 37 C. C. A. 177.

Power of sale given by the will to executors cannot be exercised by the widow, after the death of the executors. *Box v. Word*, 65 Tex. 159.

⁴⁹ *Cowell v. So. Denver R. E. Co.*, 16 Colo. App. 108, 63 Pac. 991; *McMillan v. Cox*, 109 Ga. 42, 34 S. E. 341.

⁵⁰ *Hull v. Culver*, 34 Conn. 403; *Peckham v. Lego*, 57 Conn. 555, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130; *In re Simon's Will*, 55 Conn. 240, 11 Atl. 36; *Cox v. Wills*, 49 N. J. Eq. 130, 22 Atl. 794; *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. 527.

⁵¹ *Little v. Geer*, 69 Conn. 411, 37 Atl. 1056; *Lawrence v. Beardsley*, 74 Conn. 1, 49 Atl. 190; *Reed v. Reed*, 80 Conn. 401, 68 Atl. 849; *Bartlett v. Buckland*, 78 Conn. 517, 63 Atl. 350; *Threlkeld v. Threlkeld*, 238 Mo. 459, 141 S. W. 1121; *Gibson v. Gibson*, 239 Mo. 490, 144 S. W. 770; *In re Estate of Schuck*, 87 Neb. 46, 127 N. W. 652.

Where the will gives the widow power to sell the property "for her own comfort and support" the power to sell rests in her discretion, and it is not necessary in order for her to sell, that she be supported by a decree of a court of equity that the sale is necessary

is he beyond the restraining power of equity to prevent an abuse of the power or a fraud upon the rights of the remainderman.⁵²

§ 155. Rule in Shelley's case

The rule in Shelley's case, while part of the general law of real property, has such a special bearing on devises that it may well be mentioned here.⁵³

The rule is to the effect that if a life estate be granted or devised to a man, with a remainder to his own heirs, either in fee simple or fee tail, the life estate in the first taker becomes a fee which he may alien or encumber and bar his heirs.⁵⁴ The heirs in such a case are said to take by descent and not by purchase. The distinction between purchase and descent is this: That an heir who takes by descent takes the estate of his ancestor with all the burdens his ancestor has placed upon it, but he who takes the land by purchase takes an independent estate of his own by virtue of the first grant or devise, and therefore takes it free from any of the acts of the intermediate

for her support and comfort. *Griffin v. Nicholas*, 224 Mo. 275, 123 S. W. 1063.

⁵² *Peckham v. Lego*, 57 Conn. 553, 19 Atl. 392, 7 L. R. A. 419, 14 Am. St. Rep. 130; *Little v. Geer*, 69 Conn. 411, 37 Atl. 1056; *Burnet v. Burnet*, 244 Mo. 491, 148 S. W. 872.

⁵³ Shelley's case is reported in 1 Coke, 227, decided in 1579.

⁵⁴ *Goldsby v. Goldsby*, 38 Ala. 404; *Holt v. Pickett*, 111 Ala. 362, 20 South. 432; *Norris v. Hensley*, 27 Cal. 439; *Goodrich v. Lambert*, 10 Conn. 453; *Griffith v. Derringer*, 5 Har. (Del.) 284; *Terry v. Hood*, 172 Ala. 40, 55 South. 423; *Lacey v. Floyd*, 99 Tex. 112, 87 S. W. 665; *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160.

holders. It was possible at common law to grant or devise a life estate to one person, and limit the remainder to any other person, except the first taker's own heirs. The rule in Shelley's case did not permit this because it did not really create any new interest in the property but simply operated to the injury of creditors and other innocent third persons.

The rule is one of law and not of construction and is not governed by the intention of the testator.⁵⁵ It does not extend to bequests of personal property.⁵⁶ In order for the rule to apply the title which the remaindermen take by devise must be the same as they would have taken by descent had a fee been given to the life tenant, and without any other estates dependent thereon.⁵⁷ Thus the rule does not apply where there is a contingent remainder over.⁵⁸

⁵⁵ *Jones v. Rees*, 6 Pennewill (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734; *Robert v. West*, 15 Ga. 122; *Brooks v. Evetts*, 33 Tex. 732; *Brown v. Bryant*, 17 Tex. Civ. App. 454, 44 S. W. 399.

Contra: Rule in Shelley's case will yield to manifest intention of testator. *Tendick v. Evetts*, 38 Tex. 275-281; *Hancock v. Butler*, 21 Tex. 804; *Hawkins v. Lee*, 22 Tex. 544; *Albin v. Parmele*, 70 Neb. 740-744, 98 N. W. 29.

⁵⁶ *Gross v. Sheeler*, 7 Houst. (Del.) 280, 31 Atl. 812; *Jones v. Rees*, 6 Pennewill (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734.

⁵⁷ *Estate of Utz*, 43 Cal. 200; *Jamison v. McWhorter*, 7 Houst. (Del.) 242, 31 Atl. 517; *Craig v. Rowland*, 10 App. D. C. 402-413.

⁵⁸ *Daniel v. Whartenby*, 17 Wall. 639, 21 L. Ed. 661; *De Vaughn v. Hutchinson*, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827; *De Vaughn v. De Vaughn*, 3 App. D. C. 50; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97.

Land devised for life, remainder to issue, and on failure of issue, then over, does not vest fee in first taker under rule in Shelley's Case. *Trimble v. Rice* (S. C.) 204 Fed. 407, 122 C. C. A. 658.

In order that two estates shall coalesce under the rule in Shelley's case they must be of the same quality—that is, both must be legal or both equitable and if one be equitable and the other legal the rule will not apply.⁵⁹

The rule has been abolished by statute in England⁶⁰ and in many of the states, and a grant or devise that would formerly have vested a fee in the first taker now gives the heir a life estate only, with remainder in fee to his heirs.⁶¹

§ 156. Executory devises

The term “executory devise” is used to describe an estate which may be created by will, which would not be valid under the common law if made by a conveyance *inter vivos*. Thus, by the rules of the common law, a future estate could not be created without a particular estate to support it; a fee could not be limited to take effect after a fee; and a future estate could not be created in personal property. Such estates may be valid if created by will and are called executory devises.⁶² The vesting

⁵⁹ *Vogt v. Vogt*, 26 App. D. C. 46; *Vogt v. Graff*, 222 U. S. 404, 32 Sup. Ct. 134, 56 L. Ed. 249 (affirming 33 App. D. C. 356); *Slater v. Rudderforth*, 25 App. D. C. 497.

⁶⁰ Stat. 1 Victoria, c. 26.

⁶¹ *Tesson v. Newman*, 62 Mo. 198; *Cross v. Hoch*, 149 Mo. 341, 50 S. W. 786; *Copley v. Ball* (W. Va.) 176 Fed. 682, 100 C. C. A. 234; *King v. Beck*, 15 Ohio, 561; *Wilkerson v. Clark*, 80 Ga. 367-372, 7 S. E. 319, 12 Am. St. Rep. 258.

⁶² *Chew v. Keller*, 100 Mo. 362, 13 S. W. 395; *Naylor v. Godman*, 109 Mo. 543, 19 S. W. 56; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Clarke v. Terry*, 34 Conn. 177; *McArthur v. Scott*, 113 U. S. 340, 5

of the estate is postponed by the clear intention of the testator; and, as the fee must vest somewhere it remains in the executor or in the heir-at-law in case no other provision is made. In case of doubt whether a certain disposition is an executory devise or a contingent remainder, the courts favor the latter.

An executory devise is an estate limited after a fee while a remainder is one limited after a particular estate.⁶³ Executory devises were similar to springing and shifting uses, but without reference to the Statute of Uses. They were all methods of evading the restrictions of the feudal system, such as livery of seizin.

An estate determinable upon the happening of an event that may not happen is not a life estate followed by a contingent remainder, but a base fee followed by an executory devise.⁶⁴

Sup. Ct. 652, 28 L. Ed. 1015; *Harrington v. Roe*, 1 *Houst. (Del.)* 398; *Thresher's Appeal*, 74 *Conn.* 40, 49 *Atl.* 861; *Couch v. Gorham*, 1 *Conn.* 36; *Morgan v. Morgan*, 5 *Day (Conn.)* 520-526; *Alfred v. Marks*, 49 *Conn.* 473; *Jewell v. Pierce*, 120 *Cal.* 79-84, 52 *Pac.* 132; *Moody v. Walker*, 3 *Ark.* 147; *Robinson v. Adams*, 4 *Dall. App'x* xii, 1 *L. Ed.* 920; *Abbott v. Essex*, 18 *How.* 202, 15 *L. Ed.* 352; *Cropley v. Cooper*, 19 *Wall.* 167, 22 *L. Ed.* 109; *Waring v. Jackson*, 1 *Pet.* 570, 7 *L. Ed.* 266; *Britton v. Thornton*, 112 *U. S.* 526, 5 *Sup. Ct.* 291, 28 *L. Ed.* 816; *Holcomb v. Wright*, 5 *App. D. C.* 76; *Matthews v. Hudson*, 81 *Ga.* 120, 7 *S. E.* 286, 12 *Am. St. Rep.* 305; *Knowles v. Knowles*, 132 *Ga.* 806, 65 *S. E.* 128; *Brown v. Tuschoff*, 235 *Mo.* 449, 138 *S. W.* 497; *Griffin v. Morgan* (*D. C. Vt.*) 208 *Fed.* 660.

⁶³ *Sullivan v. Garesche*, 229 *Mo.* 496, 129 *S. W.* 949, 49 *L. R. A. (N. S.)* 605.

Not cross executory devise. *Lich v. Lich*, 158 *Mo. App.* 400, 138 *S. W.* 558.

⁶⁴ *Matthews v. Hudson*, 81 *Ga.* 120-126, 7 *S. E.* 286, 12 *Am. St. Rep.* 305.

The fact that there is a limitation over, by way of executory devise, does not prevent the vesting of the estate. It merely renders it subject to be divested upon the happening of the contingency.⁶⁵

Every limitation over by way of an executory devise is inconsistent with any right on the part of the first taker to alienate or incumber the property as against those who may be entitled to succeed there-to upon the termination of his estate.⁶⁶

When the first devisee has the absolute power to dispose of the property in his own unlimited discretion an estate over is void; void as a remainder, because of the preceding fee, after which a remainder cannot be limited, and void as an executory devise, because a valid executory devise cannot subsist

⁶⁵ *Austin v. Bristol*, 40 Conn. 120-124, 16 Am. Rep. 23.

⁶⁶ *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Moody v. Walker*, 3 Ark. 147; *Satterfield v. Tate*, 132 Ga. 256, 64 S. E. 60.

A will devised to a son certain real estate but with the restriction that up to the age of twenty-five years he should only have the right to receive and dispose of the revenue thereof without the right to mortgage, encumber or sell the property. In case the son died before reaching the age of twenty-five years, the property should pass to a daughter. The son mortgaged the property and died before arriving at the age of twenty-five years. Held that even if the restriction on alienation be held void the result would be that the son would take an estate in fee simple, subject to be defeated and to pass to the daughter in case he died before arriving at the age of twenty-five years. This is the most common form of an executory devise and is legal when the contingency upon which the first estate is to expire must necessarily happen within a life or lives in being and twenty-one years thereafter. Held that the mortgage was good only as to the defeasible fee. *Laval v. Staffel*, 64 Tex. 370.

under an absolute power of disposition in the first taker.⁶⁷

The interest of a devisee in an executory devise will pass by will or by descent, before the contingency happens.⁶⁸

A void executory devise leaves the estate absolute in the prior taker.⁶⁹

§ 157. Rule against perpetuities

While the law permits the creation by will of executory devises, contrary to the rules of the common law, there is a positive limit within which all future estates must vest absolutely; or, as it is said, "a limit beyond which the hand of the dead may not fetter the property of the living." This is called the rule against perpetuities. It would be an intolerable thing if a testator, because he had once been the owner of a piece of property, should be allowed to limit its ownership for an indefinite time in the future after he was dead. A testator may create as many life estates, contingent remainders, or executory devises as he chooses, but he cannot postpone the vest-

⁶⁷ *Gannon v. Albright*, 183 Mo. 238, 81 S. W. 1162, 67 L. R. A. 97, 105 Am. St. Rep. 471; *Miles v. Strong*, 68 Conn. 273, 36 Atl. 55.

⁶⁸ *Kean's Lessee v. Hoffecker*, 2 Har. (Del.) 103, 29 Am. Dec. 336.

All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration; and all contingent estates of inheritance as well as springing and executory uses and possibilities, coupled with an interest where the person to take is certain, are transmissible by descent and devisable and assignable. *Nimmo v. Davis*, 7 Tex. 26-34.

⁶⁹ *Cody v. Staples*, 80 Conn. 82, 67 Atl. 1.

ing beyond one unborn generation. A gift to an unborn child of a living person is good, but one to the unborn child of an unborn child is void. The rule is expressed thus:

An executory devise must take effect, if at all, within a period comprised within a life or lives in being, and twenty-one years thereafter, with the addition of the period of gestation of a child en ventre sa mere.⁷⁰

The rule here given is the common law, and is in force in most states. In some states the rule has been still further narrowed by statute.⁷¹

⁷⁰ *Lockridge v. Mace*, 109 Mo. 162, 18 S. W. 1145; *Moody v. Walker*, 3 Ark. 147; *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; *Ashton v. Ashton*, 1 Dall. 4, 1 L. Ed. 12; *Long v. Blackhall*, 7 Term R. 100; *Carlton v. Price*, 10 Ga. 495-498; *McLeod v. Dell*, 9 Fla. 427-446; *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 989; *Laval v. Staffel*, 64 Tex. 370.

⁷¹ The rule against perpetuities by statute in Connecticut was: "No estate in fee simple, fee tail or any less estate, shall be given by deed or will to any persons but such as are, at the time of making such deed or will, in being, or to their immediate issue or descendants." Gift to the "heirs of W." is void under this rule, as the heirs might be grandchildren or other remote descendants. *Alfred v. Marks*, 49 Conn. 473-476.

Under this statute many devises were held void: *Rand v. Butler*, 48 Conn. 293; *Wheeler v. Fellowes*, 52 Conn. 238; *Andrews v. Rice*, 53 Conn. 566, 5 Atl. 823; *Anthony v. Anthony*, 55 Conn. 239, 11 Atl. 45; *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075; *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 963; *Landers v. Dell*, 61 Conn. 189, 23 Atl. 1083; *Belfield v. Booth*, 63 Conn. 299, 27 Atl. 585; *Johnson v. Webber*, 65 Conn. 501, 33 Atl. 506; *Morris v. Bolles*, 65 Conn. 45, 31 Atl. 538; *Ketchum v. Corse*, 65 Conn. 85, 31 Atl. 486; *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107; *Tingier v. Chamberlin*, 71 Conn. 466, 42 Atl. 718; *Blakeman v. Sears*, 74 Conn. 516, 51 Atl. 523; *Gerard v. Ives*, 78 Conn. 485, 62 Atl. 607; *Grant v. Stimpson*, 79 Conn. 617, 66 Atl. 166; *Buck v. Lincoln*, 76 Conn. 149,

Wills speak from the death of the testator and limitations as regards the rule against perpetuities must be reckoned from that time.⁷²

A perpetuity is any limitation or condition which *may* (not which will or must) take away or suspend the absolute power of alienation for a period beyond the continuance of lives in being. The absolute power of alienation is equivalent to the power of conveying an absolute fee. The law against the suspension of the power of alienation applies to every kind of conveyance and devise. It applies to all trusts, whether created by will or deed, whether providing for remainders or executory devises, or, as here, merely restraining the power of alienation for a fixed period of years, and then providing for a sale with gift over. In short, it covers the entire field of estates, interests, rights and possibilities. A perpetuity will no more be tolerated when it is covered by a trust than when it displays itself undisguised in the settlement of a legal estate.⁷³

All limitations which violate this rule are void, and in construing a devise to ascertain whether it is contrary to the rule the question is whether it

56 Atl. 522; *White v. Allen*, 76 Conn. 185, 56 Atl. 519; *Lepard v. Clapp*, 80 Conn. 29, 66 Atl. 780; *Harmon v. Harmon*, 80 Conn. 44, 66 Atl. 771; *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33; *Perry v. Bulkley*, 82 Conn. 158, 72 Atl. 1014; *Pease v. Cornell*, 84 Conn. 391, 80 Atl. 86; *Hartford Tr. Co. v. Wolcott*, 85 Conn. 134, 81 Atl. 1057; *Allen v. Davies*, 85 Conn. 172, 82 Atl. 189.

But in 1895 the troublesome statute was repealed and the common law rule against perpetuities now prevails. *Tingier v. Woodruff*, 84 Conn. 684-689, 81 Atl. 967.

California statute is life or lives in being and applies to personal property as well as real. *In re Walkerly*, 108 Cal. 627-656, 41 Pac. 772, 49 Am. St. Rep. 97.

⁷² *Estate of Lux*, 149 Cal. 200, 85 Pac. 147.

Titles become fixed as of the death of the testator and the subsequent repeal of the statute against perpetuities cannot make valid a void devise. *Cody v. Staples*, 80 Conn. 82, 67 Atl. 1.

⁷³ *In re Walkerly*, 108 Cal. 627-647, 41 Pac. 772, 49 Am. St. Rep.

might have such effect. If it might, *under the terms of the devise*, postpone the vesting for a longer period than the rule permits, then it is void; even though, as events turn out, it did not really have that effect.⁷⁴

The rule against perpetuities does not, however, require that the particular individuals in whom the title is to vest shall be ascertainable at the testator's death; it is enough if it be certain that they will be definitely ascertainable within the prescribed period.⁷⁵

If a devise is made upon alternative contingencies and one alternative be void, as a perpetuity, the other may take effect.⁷⁶

Where the remainder over is void as a perpetuity the fee vests in the last person who had a vested interest.⁷⁷

97; *Wheeler v. Fellowes*, 52 Conn. 238; *Bates v. Spooner*, 75 Conn. 501, 54 Atl. 305; *Estate of Cavarly*, 119 Cal. 406, 51 Pac. 629.

⁷⁴ *Hanley v. K. & T. Coal Co.*, 110 Fed. 62; *Rand v. Butler*, 48 Conn. 293; *Jocelyn v. Nott*, 44 Conn. 55.

A will creating a fund of which the interest only is to be used for keeping the grave lot of the testator in good condition is unlawful as being within the prohibition against perpetuities. *McIlvain v. Hockaday*, 36 Tex. Civ. App. 1, 81 S. W. 54.

⁷⁵ *Bates v. Spooner*, 75 Conn. 501, 54 Atl. 305; *Tingler v. Woodruff*, 84 Conn. 684, 81 Atl. 967; *Healy v. Healy*, 70 Conn. 467-471, 39 Atl. 793.

⁷⁶ *Perkins v. Fisher*, 59 Fed. 801, 8 C. C. A. 270; *Threshers' Appeal*, 74 Conn. 40, 49 Atl. 861; *Landram v. Jordan*, 203 U. S. 56, 27 Sup. Ct. 17, 51 L. Ed. 88; *Halsey v. Goddard* (C. C.) 86 Fed. 25.

⁷⁷ *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107; *Farnam v. Farnam*, 83 Conn. 369, 77 Atl. 70; *Smith v. Dunwoody*, 19 Ga. 237; *Landram v. Jordan*, 25 App. D. C. 291.

The courts draw a distinction between the postponement of the *vesting of the title*, and the postponement of the *right of possession or enjoyment*. The latter may be postponed without violating the rule.⁷⁸

§ 158. Powers defined

Powers are of frequent occurrence in wills.⁷⁹ A power is distinct from an estate. It may be vested in a person who is the holder of a particular estate in the land or it may be vested in one who holds no estate. Power is always derivative. It is a species of agency, but one which, unlike ordinary agencies

⁷⁸ *Gates v. Seibert*, 157 Mo. 254, 57 S. W. 1065, 80 Am. St. Rep. 625; *Coleman v. Coleman*, 69 Kan. 39, 76 Pac. 439; *Keeler v. Lauer*, 73 Kan. 396, 85 Pac. 541.

Not void as perpetuity. *McGraw v. McGraw*, 176 Fed. 312, 99 C. C. A. 650; *Terrell v. Cunningham*, 70 Ala. 100; *Terrell v. Reeves*, 103 Ala. 264, 16 South. 54; *Guesnard v. Guesnard*, 173 Ala. 250, 55 South. 524; *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50; *Estate of Lux*, 149 Cal. 200, 85 Pac. 147; *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371; *Estate of Cross*, 163 Cal. 778, 127 Pac. 70; *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. 331; *Johnson v. Edmond*, 65 Conn. 492, 33 Atl. 503; *Johnson v. Webber*, 65 Conn. 501, 33 Atl. 506; *Robert v. West*, 15 Ga. 122; *Klingman v. Gilbert*, 90 Kan. 545, 135 Pac. 682.

The rule against perpetuities is aimed against undue restraints or alienation. A devise to a named bishop and his successors, without such restraint is not against the rule. *Lamb v. Lynch*, 56 Neb. 135, 76 N. W. 428.

⁷⁹ *Campbell v. Weakley*, 121 Ala. 64, 25 South. 694; *Edwards v. Bender*, 121 Ala. 77, 25 South. 1010; *Marx v. Clisby*, 126 Ala. 107, 28 South. 388.

Powers under will relate back to death of testator. *Welder v. McComb*, 10 Tex. Civ. App. 85, 30 S. W. 822.

does not terminate with the death of the principal. It may be defined as the right or ability to convey, charge or encumber an estate, not by virtue of, or as an incident to the title held by the person exercising the power, but by authority derived from the holder of some greater title.⁸⁰

A power of sale may be given to one who is the holder of a life estate in the land. As we have seen, such a power does not enlarge the life estate into a fee although it contemplates that a sale under such power will convey a fee to the purchaser.⁸¹

§ 159. Limitation of powers

The power of sale given to a life tenant may be limited to a particular purpose, as for her support.⁸² If the testator desires to do so, a power of sale may be given to the executor,⁸³ without giving him the legal title; in which case the power to sell is a mere

⁸⁰ This definition is of my own invention, and I offer it simply for what it is worth. The ordinary definition of a power seems to me to be obsolete and very confusing to the modern lawyer. The conventional definition follows: "Powers owe their origin to the Statute of Uses, and are thus defined: Powers are methods of causing a use with its accompanying estate to spring up at the will of a given person." Wms. Real Prop. 245.

⁸¹ *Durr v. Wilson*, 116 Ala. 125, 22 South. 536; *Little v. Giles*, 25 Neb. 313, 41 N. W. 186; *Vamplew v. Chambers*, 29 Neb. 83, 682, 45 N. W. 268, 1103.

⁸² *Bartlett v. Buckland*, 78 Conn. 517, 63 Atl. 350.

⁸³ *Campbell's Estate*, 149 Cal. 712, 87 Pac. 573; *Hatchett v. Hatchett*, 103 Ala. 556, 16 South. 550; *Pratt Co. v. Robertson*, 140 Ala. 584, 37 South. 419; *Duffield v. Pike*, 71 Conn. 521, 42 Atl. 641; *Liggat v. Hart*, 23 Mo. 127; *Wisker v. Rische*, 167 Mo. 522, 67 S. W. 218; *Griffith v. Witten*, 252 Mo. 627, 161 S. W. 708.

naked power, to be exercised only in the manner and for the purposes stated. The fee does not vest in the executor, but passes to the heirs or devisees, subject to the power.⁸⁴ So a devisee for life may be given the power to appoint by will to whom the ultimate estate shall go either generally, or among the members of a certain class.⁸⁵ A power given by will must be strictly pursued in order to cut off heirs and remaindermen.⁸⁶ It may not transcend the limits of the provisions of the will creating it.⁸⁷ Thus a power of sale does not authorize a mortgage unless within the intent of the testator.⁸⁸ Nor does it authorize

⁸⁴ *Compton v. McMahan*, 19 Mo. App. 494; *Eneberg v. Carter*, 98 Mo. 647, 12 S. W. 522, 14 Am. St. Rep. 664; *Emmons v. Gordon*, 140 Mo. 490, 41 S. W. 998, 62 Am. St. Rep. 734.

⁸⁵ *Carr v. Crain*, 7 Ark. 241; *Lane v. Lane*, 4 Pennewill (Del.) 368, 55 Atl. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122.

Where the donee of a power is given discretion in making an appointment among certain persons, that discretion will not be controlled by the court provided a substantial gift is made to each object of the power. Should the donee die without exercising the power, the court cannot exercise the discretion vested in the donee, but will divide the property equally among the beneficiaries of the power. *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920.

⁸⁶ *Cramton v. Rutledge*, 157 Ala. 141, 47 South. 214; *Rutledge v. Cramton*, 150 Ala. 275, 43 South. 822; *Wells v. Petree*, 39 Tex. 419.

⁸⁷ *Allen v. Davies*, 85 Conn. 172, 82 Atl. 189; *Davis v. Vincent*, 1 Houst. (Del.) 416.

Where wife has life estate, with power to dispose of fee for her own benefit, she has not the right to dispose of the property merely for the purpose of defeating the rights of the residuary legatees and devisees under the will. *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 50 S. W. 648.

Contra: *Vamplew v. Chambers*, 29 Neb. 83, 682, 45 N. W. 268, 1103; *Hanna v. Ladewig*, 73 Tex. 37, 11 S. W. 133; *District v. Jones*, 38 App. D. C. 560.

⁸⁸ *O'Brien v. Flint*, 74 Conn. 502, 51 Atl. 547; *Price v. Courtney*, 87

a disposition by will,⁸⁹ although a power duly given may be exercised in part only.⁹⁰

The validity of the estates created under the exercise of a power is tested by the same rules as though made by the will of the original donor of the power.⁹¹ It is but the continuation of the act of the donor, and is not rendered void by the possibility of a void conveyance or appointment being made thereunder; in legal effect it is a power to do only what is lawful.⁹²

§ 160. Manner of executing powers

At common law a power or authority was not considered as executed unless by some reference to the power or authority or to the property which was the subject of it, or unless the provision made by the person intrusted with the power would have been ineffectual, that is, would have had nothing to operate upon except it were considered as an execution of such power or authority.⁹³

Mo. 387, 56 Am. Rep. 453; *Freeman v. Bristol Sav. Bank*, 76 Conn. 212, 56 Atl. 527; *Townsend v. Wilson*, 77 Conn. 411, 59 Atl. 417; *Dougherty v. Dougherty*, 204 Mo. 228, 102 S. W. 1099; *McMillan v. Cox*, 109 Ga. 42, 34 S. E. 341; *Dewein v. Hooss*, 237 Mo. 23, 139 S. W. 195; *Quisenberry v. Watkins Land Co.*, 92 Tex. 247, 47 S. W. 708.

Nor the incorporation of the estate. *Garesche v. Levering Inv. Co.*, 146 Mo. 436, 48 S. W. 653, 46 L. R. A. 232.

⁸⁹ *State v. Smith*, 52 Conn. 562.

⁹⁰ *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33.

⁹¹ *Heald v. Briggs*, 83 Conn. 5, 74 Atl. 1123.

⁹² *Bartlett v. Sears*, 81 Conn. 34, 70 Atl. 33.

⁹³ *Lane v. Lane*, 4 Pennewill (Del.) 368, 55 Atl. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122; *Davis v. Vincent*, 1 Houst. (Del.) 410; *O'Brien v. Flint*, 74 Conn. 502, 51 Atl. 547; *Harker v. Reilly*, 4

The intent to execute the power need not be recited in the instrument but may appear from the circumstances.⁹⁴

A general devise or legacy which does not allude to the power is not considered an execution of the power⁹⁵ except where some statute has changed the rule of the common law.

The rules of the common law in respect to the execution of powers were changed by the statute 1 Vict. c. 26, § 27, passed in 1837 which provides that a general devise of real estate or a general bequest of personal property of the testator should be construed to include all real estate or personal property, over which such testator may have had a power of appointment and should operate as the execution of such power unless a contrary intention should appear by the will.

§ 161. Personal property—Life estates and future interests

While there is a growing tendency to amalgamate the rules relating to real and personal property there remains a natural and an inherent difference, arising out of the fixed and permanent

Del. Ch. 72; *Middlebrooks v. Ferguson*, 126 Ga. 232, 55 S. E. 34; *Papin v. Piednoir*, 205 Mo. 521, 104 S. W. 63; *Lawless v. Kerns*, 242 Mo. 392, 146 S. W. 1169; *Weir v. Smith*, 62 Tex. 1; *Willier v. Cummings*, 91 Neb. 571, 136 N. W. 559, Ann. Cas. 1913D, 287.

⁹⁴ *Coombs v. O'Neal*, 1 MacArthur (D. C.) 405.

⁹⁵ *Lane v. Lane*, 4 Pennewill (Del.) 368, 55 Atl. 184, 64 L. R. A. 849, 103 Am. St. Rep. 122; *Johnson v. Stanton*, 30 Conn. 297.

character of real property and the movable and perishable character of personal property. An absolute estate is more readily inferred in a gift of personal property than in one of real property.⁹⁶ But limited interests may now be created in chattels.

Chattels, other than such as are consumed by using, may be bequeathed for life, with remainder over,⁹⁷ or an interest may be given in personal property, to begin in the future.⁹⁸

The common law did not permit future interests in personal property. All such gifts were absolute, and attempted limitations over were void. They were permitted only in wills and hence, solely because they violated the rules of the common law, they were classed as executory devises. This classification is mislead-

⁹⁶ *Martin v. Fort*, 83 Fed. 19, 27 C. C. A. 428; *Robinson v. Bishop*, 23 Ark. 378; *State v. Warrington*, 4 Har. (Del.) 55; *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278; *State v. Sliney*, 78 Conn. 397, 62 Atl. 621; *Lorton v. Woodward*, 5 Del. Ch. 505; *Snyder v. Baker*, 16 D. C. 443; *Roberts v. Carr*, Dud. (Ga.) 178.

⁹⁷ *Swearingen v. Taylor*, 14 Mo. 391; *Riggins v. McClellan*, 28 Mo. 23; *Turner v. Timberlake*, 53 Mo. 377; *Harbison v. James*, 90 Mo. 411, 2 S. W. 292; *Lewis v. Pitman*, 101 Mo. 281, 14 S. W. 52; *Hitchcock v. Clendennin*, 6 Mo. App. 99; *Board v. Dimmitt*, 113 Mo. App. 41, 87 S. W. 536; *State v. Warrington*, 4 Har. (Del.) 55; *Clarke v. Terry*, 34 Conn. 177; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Vaughan v. Parr*, 20 Ark. 600; *Cox v. Britt*, 22 Ark. 567; *Forley v. Gilmer*, 12 Ala. 141, 46 Am. Dec. 249; *Underwood v. Underwood*, 162 Ala. 553-561, 50 South. 305, 136 Am. St. Rep. 61; *Holman's Case*, 24 Pa. 174; *Stoner's Case*, 2 Pa. 428, 45 Am. Dec. 608; *Baskin's Case*, 3 Pa. 304, 45 Am. Dec. 641; *Armiger v. Reitz*, 91 Md. 334, 46 Atl. 99; *Sutphen v. Ellis*, 35 Mich. 446; *Langworthy v. Chadwick*, 13 Conn. 42; *Thornton v. Burch*, 20 Ga. 791; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404.

⁹⁸ *Austin v. Watts*, 19 Mo. 293.

ing and should now be abandoned. In truth they bear no analogy to executory devises of real property. The latter are estates created by will which are neither vested nor contingent remainders. Future interests in personal property, even though created by will, are either vested or contingent remainders.

The same expressions which in a freehold create an estate tail or an executory devise, in chattels create an absolute interest; otherwise it would tend to a perpetuity, as the devisee or grantee in tail has no method of barring the entail.⁹⁹

The law having recognized these future interests in personalty, it is better to treat them frankly as vested and contingent remainders, and drop the obsolete term "executory devise" as applied to personal property.

At the common law there was no remainder to a chattel interest, and any gift or bequest of a chattel, no matter how short the time, passed the absolute property. This rule was gradually relaxed, and a distinction taken between a gift of the thing itself and of the use of the thing; the law attaching a validity to the latter which it denied to the former. This modification of the common law rule in time also gave way to the rule, as we now understand it to exist, that whether the gift be of the thing itself for life, or only of the use of the thing, a limitation over to a subsequent devisee after the decease of the first taker will be supported. Such life estate or use, however, must be clearly expressed. for it has been decid-

⁹⁹ *Hudson v. Wadsworth*, 8 Conn. 348-361; *State v. Tolson*, 73 Mo. 320; *Chism v. Williams*, 29 Mo. 288; *Moody v. Walker*, 3 Ark. 147; *Jones v. Jones*, 20 Ga. 699; *Gray v. Gray*, 20 Ga. 804; *Childers v. Childers*, 21 Ga. 377; *Lee v. McElvy*, 23 Ga. 129.

ed with great unanimity, by the English and American courts, that whatever will directly or constructively constitute an estate in tail in lands, will pass an absolute estate in personal property.¹

§ 162. Protection of remaindermen in future estates in personal property

What protection has the remainderman in such a case, and what assurance has he that he will ultimately get the bequest? This is one of the natural difficulties in recognizing future estates in personal property. Such property is liable to be wasted, destroyed, converted into other forms, or carried out of the jurisdiction.

Some courts have held that it is the duty of the executor to require a bond of the life tenant that the property will be forthcoming to answer the claim of the remaindermen. In default of such bond the executors should retain and invest the property and pay over only the income to the life tenant.² Most courts, however, hold that the life tenant is entitled to demand possession of the property, and that he is a quasi trustee for the remaindermen.³

¹ *Maulding v. Scott*, 13 Ark. 88-91, 56 Am. Dec. 298.

² *Clarke v. Terry*, 34 Conn. 177; *Chase v. Howie*, 64 Kan. 320, 67 Pac. 822; *Chisholm v. Lee*, 53 Ga. 611; *Lee v. Chisholm*, 56 Ga. 126; *Sanford v. Gilman*, 44 Conn. 463.

³ *Estate of Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; *Underwood v. Underwood*, 162 Ala. 553, 50 South. 305, 136 Am. St. Rep. 61; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404.

"It is contended by the appellant that the widow was not entitled to the possession of the personal property, in which she was given only a life estate, but that the superior court, instead of distributing

Where there is danger that the personal property given to a life tenant will be either wasted, secreted

the property directly to her during the term of her life, should have directed that it be converted into money, and invested in some securities from which she would be entitled to receive only the income thereof during her lifetime, and, at her death, the securities should be delivered to the children. In England, and in some jurisdictions within the United States, the administration of an estate is regarded as a continuing trust, and the executor as a trustee for all the parties interested in the estate, for the purpose of carrying into effect the various provisions of the will; and in these jurisdictions the rule prevails that when personal property, consisting of money or securities, is given to one for life, with a remainder to another, the executor, as a trustee of both, shall convert the property into interest bearing securities, and pay the income thereof to the legatee for life, and, after his death, deliver the securities to the remaindermen. *Howe v. Earl of Dartmouth*, 7 Ves. 137; *Howard v. Howard*, 16 N. J. Eq. 486; *Covenhoven v. Shuler*, 2 Paige (N. Y.) 132, 21 Am. Dec. 73. At an early day in England it was the rule in chancery that the life tenant, before he could demand the delivery to him of property bequeathed to him for life, should give security to the executor; but as early as the time of Lord Talbot, in 1734, this rule had been modified to such an extent as to require the life tenant merely to deliver to the remainderman an inventory that the property was held by him for life only. *Slanning v. Style*, 3 P. Wms. 336. See, also, *Foley v. Burnell*, 1 Brown Ch. 279; *Westcott v. Cady*, 5 Johns. Ch. (N. Y.) 349, 9 Am. Dec. 306. This rule has been made applicable in this state only to a bequest for life of specific legacies. Civ. Code § 1365. If the will is silent concerning the disposition of the corpus of the legacy during the continuance of the life estate, the general rule in equity is that the legatee for life is not entitled to demand from the executor the possession of the legacy, unless he gives security to the executor, and that the remainderman may require that the tenant for life, before receiving the property bequeathed to him, shall give such security; but, in order that the remainderman may demand that such security be given, he must make it appear that there is some danger that the estate will be impaired or suffer waste if left in the possession of the life tenant. *In re Camp*, 126 N. Y. 377, 27 N. E. 799; *Story's Equity Jurisprudence*, § 604; *Langworthy v. Chadwick*, 13 Conn. 42. The rule is one of equity, established by courts for the

or removed out of the state a court of chancery will protect the interest in remainder, by compelling the tenant for life to give security.⁴

protection of the remainderman, in the absence of any direction in the will; but the rule thus established must yield to the terms of the will, and if it appears from a proper construction of the will that it was the intention of the testator that the property should be placed in possession of the life tenant without security, such intention will be carried out. It is to be assumed that the testator intended the life tenant to have the full enjoyment during his lifetime of the property bequeathed to him, and that this enjoyment shall not be impaired, except for the protection of the remainderman. The testator has the right to make the life tenant the trustee of the property bequeathed, without requiring any security from him; and very slight indications in the will will be construed as showing that the testator intended the life tenant, rather than the executor, to be the trustee, subject of course, to the general rules applicable to the obligation of a trustee to his cestui que trust. If the testator has not required such security to be given by the life tenant, courts are not authorized to require it, in the absence of any showing of danger or liability of waste; otherwise, the will of the testator that the life tenant shall enjoy the property will be frustrated. There is nothing, however, in the rules of procedure in this state, or in the will under consideration, which authorized such a procedure in the distribution of an estate. The administration of an estate in this state is conducted under the direction of the superior court, mainly for the purpose of securing to the creditors payment of their claims, and, after this purpose has been accomplished, in the absence of any express provisions in the will, the estate is to be distributed to the beneficiaries under the will in accordance with its terms, and the executor is entitled to be discharged from any further duties. The provisions of the will become merged in the decree of distribution, and the terms of this decree become the measure of the rights of the several beneficiaries. Sitting as a court in probate, the function of the superior court is limited to a judicial determination that the

⁴ Langworthy v. Chadwick, 13 Conn. 42; Hudson v. Wadsworth, 8 Conn. 348; Horton v. Upham, 72 Conn. 29, 43 Atl. 492; De Loney v. Hull, 128 Ga. 778, 58 S. E. 349.

The remainderman may also recover at law from the representatives of the life tenant,⁵ but as the property has passed out of the control of the executor the latter has no such right.⁶

§ 163. Dying without issue—History of phrase

One of the most troublesome provisions, occurring in wills, with which courts have to deal is where the testator has made a general or absolute devise to one, followed mediately or immediately by a provision that if the first taker die without issue the estate shall pass to others. Various forms of language may be used to express this provision, and sometimes, though rarely, the particular lan-

estate of the testator is to be transferred to the beneficiaries as the testator has provided in his will; and the court is not authorized to add to its terms or qualify those provisions. There is no provision in our statutes authorizing the court to direct a conversion of the testator's property, or requiring the legatee for life to give any security before receiving his legacy. If the legatees in remainder deem it necessary that their rights in the property, shall be protected or preserved, they must seek such relief from the equity arm of the superior court." *In re Garrity*, 108 Cal. 463-469, 38 Pac. 628, 41 Pac. 485.

⁵ *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404; *Griggs v. Dodge*, 2 Day (Conn.) 28, 2 Am. Dec. 82; *Taber v. Packwood*, 2 Day (Conn.) 52.

Difficulty of preserving identity of personal property bequeathed to wife for life with remainder. *Leonard v. Owen*, 93 Ga. 678, 20 S. E. 65.

Assets distributed by a corporation in liquidation are regarded as principal and not income as between life tenant and remainderman. *Bulkeley v. Worthington Ecc. Soc.*, 78 Conn. 526, 63 Atl. 351, 12 L. R. A. (N. S.) 785; *Bishop v. Bishop*, 81 Conn. 509, 71 Atl. 583, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306.

⁶ *Bates v. Woolfolk*, 5 Ga. 329.

guage used by the testator will indicate with a fair degree of clearness the exact intention that he had in mind in regard to the character, extent and duration of the various estates which he has sought to create. In the larger number of cases, however, it is apparent that the choice of the language employed was purely accidental. The slight variation of language, or the order or arrangement of words in the various cases, indicates no fundamental difference in the legal effect of the provisions. All those cases which profess to be decided by discovering the testator's "intention" in the particular case are here, as in other branches of this subject, utterly worthless as precedents, and confusing and misleading to laymen, lawyers and trial courts.

It is said that the early common law favored freedom both of person and property, but the introduction of the feudal system changed all that as to real property, and turned alodial lands into mere tenancies. No sooner had that system seized the land in its mailed grasp than the battle for freedom began again and continued slowly and painfully through the ages, freedom always taking one firm step in advance and holding the ground she gained. In the struggle the courts both of common law and equity were usually on the side of freedom and Parliament, dominated by the feudal barons, fought for archaic privilege. In this battle of wits the courts had a steady advantage over the legislature. When feoffments came into use the estate most

often conveyed bears its Norman stamp in its name of fee-tail. It was a grant of the fee but limited in descent to the heirs of the grantee's body or the heirs male of his body—in other words, to his issue. The dominant idea was of course to keep the land within the family—to make of land a political and social, instead of an economic factor. The courts promptly held that, under such a grant, as soon as the grantee had issue the estate became absolute in him and that he could alien or encumber the estate and cut off the entail. Parliament responded by passing the statute “de donis,”⁷ requiring the courts to enforce the exact language of the grant. Under this statute estates tail became permanent in the law, until the courts, borne down by the weight of a great public evil for which there was no legislative remedy, by another stretch of judicial power held that the tenant in tail might suffer a common recovery and thus bar the entail.⁸

As an estate tail is a particular estate an estate of freehold, limited after an estate tail, is a contingent remainder.⁹ If the particular estate upon which a contingent remainder is limited fails or comes to an end before the contingent remainder can take effect the remainder fails also. Therefore, when it was decided that a fee tail could be barred by a common recovery, the contingent remainder limited upon

⁷ Statute of Westminster II, 13 Edw. I, c. I (1285).

⁸ Taturam's Case, 12 Edw. IV (1472).

⁹ 2 Washburn, Real Prop. § 1747.

the indefinite failure of the issue in tail was barred also. This put an end to the contingent remainder upon the indefinite failure of issue of the tenant in tail and left the land free and unfettered of the entail.

But the Parliament in 1542 passed the Statute of Wills, conferring the power to make wills of freehold lands. Very soon after that the feudal lawyers invented the executory devise—an estate which could be created only by will and which violated the common law rules of conveyancing. At common law a fee could not be limited after a fee, but this could be done by will and was called an executory devise, which was a simple transplanting into the common law of the shifting and springing uses which had become familiar in equity before the Statute of Uses and the Statute of Wills.

It was decided that if a devise be made to one and in case he die without issue then to another, this was a fee limited upon a fee and was good as an executory devise and could not be barred by a common recovery.¹⁰ It had always been held that there could be no fee tail in chattel interests, such as a term of years, because such interest could not be barred by a common recovery. Words which would create a fee tail as to real estate would if applied to personal property create an absolute in-

¹⁰ *Pells v. Brown*, Cro. Jac. 590 (17th year James I—1619). This case established executory devises.

terest.¹¹ When executory devises were first invented they applied, as their name indicates, only to real property. The original case of *Pells v. Brown* was silent as to chattels. In the Duke of Norfolk's case, however, in 1695,¹² there was a difference of opinion between the three common law judges and Lord Chancellor Nottingham as to whether an executory devise over on a devisee dying without issue was valid as to a chattel interest, a term of years. The judges were against the limitation and the Chancellor for it. The case was taken to the House of Lords and the Chancellor's opinion affirmed. Thus the old system of entail writhed its slimy way back into the law in a more pernicious form than ever. It was considered that a devise to one, and if he died without issue, then to another, meant an indefinite failure of issue at any time in the future unless there were qualifying words showing an intention on the part of the testator to limit it to a definite failure of issue, that is, a failure of issue living at the death of the first taker. As to personal property the presumption was that the words imported a definite failure of issue.¹³

The fact that as to real estate it was possible to create an executory devise which could not be

¹¹ *Chandless v. Price*, 3 Ves. Jr. 99; *Paterson v. Ellis*, 11 Wend. (N. Y.) 259; *Robert v. West*, 15 Ga. 122; *Hose v. King*, 24 Ga. 424; *Brown v. Weaver*, 28 Ga. 377; *Hollifield v. Stell*, 17 Ga. 280.

¹² *Duke of Norfolk's Case*, 3 Chan. Cases, 1 Pollex, 223.

¹³ *Forth v. Chapman*, 1 P. Wm. 663.

barred by a common recovery and from which the land could not be freed in any known way and which might depend upon an indefinite failure of issue, caused the courts to again assume unblushingly the power of legislation. They accordingly invented the rule against perpetuities.¹⁴ Thereafter no executory devise which exceeded or might exceed the limit set by the rule against perpetuities was valid. The effect of this rule in conjunction with the established presumption that "dying without issue" unqualified by the context must refer to an indefinite failure of issue was to render many executory devises void. It thereupon became fashionable to find in the context or language of the will some pretext for holding the intention of the testator to be that the words "dying without issue" meant issue living at the death of the first taker or the person named as ancestor and therefore valid within the rule against perpetuities.¹⁵ The fact

¹⁴ *Stephens v. Stephens*, Cas. Tenn. Talbott, 228 (1736).

¹⁵ *Porter v. Bradley*, 3 Term Repts. 143 (1789); *Paterson v. Ellis*, 11 Wend. (N. Y.) 259; *Atwell's Ex'r v. Barney*, Dud. (Ga.) 207; *Crawford v. Clark*, 110 Ga. 729, 36 S. E. 404; *Klingman v. Gilbert*, 90 Kan. 545-553, 135 Pac. 682; *Strain v. Sweeny*, 163 Ill. 603, 45 N. E. 201; *Parish v. Ferris*, 6 Ohio St. 576; *Nussbaum v. Evans*, 71 Ga. 753; *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047.

"Dying without issue" under statute in Georgia prior to 1854 is a devise limited upon indefinite failure of issue, created an estate tail by implication, which statute converted into fee simple; executory devise limited thereon was void for remoteness. *Hertz v. Abrahams*, 110 Ga. 707, 36 S. E. 409, 50 L. R. A. 361. In this opinion is full reference to line of English decisions on "dying without issue."

that the devise over was made to a surviving brother or other living person; that personal and real property were mingled in the same gift, as well as various forms of variation in the language used, were held to indicate such an intention. The confusion became so great that the question was finally settled by act of Parliament,¹⁶ providing that "dying without issue" refers to a failure of issue at the death of the first taker, unless a contrary intention appears from the will.

In the United States the confusion is much greater, owing to the large number of separate jurisdictions, each with its own judicial and statutory history. Estates tail have been abolished very generally by statute in this country. In some states they are converted into estates in fee simple¹⁷ and in others, into life estates in the first taker with remainder in fee simple in his immediate heirs.¹⁸

Many courts have struggled with this phrase "dying without issue" in its relation to the statutes abolishing estates tail, without grasping the fact that the purpose of inventing the executory devise was

¹⁶ 1 Vict. c. 26, § 29 (1837).

¹⁷ New York. *Paterson v. Ellis*, 11 Wend. (N. Y.) 259-293.

Alabama. *English v. McCreary*, 157 Ala. 487, 48 South. 113.

Maryland. *Dengel v. Brown*, 1 App. D. C. 423.

Georgia. *Lofton v. Murchison*, 80 Ga. 391, 7 S. E. 322; *Wilkerson v. Clarke*, 80 Ga. 367, 7 S. E. 319, 12 Am. St. Rep. 258; *Johnson v. Sirmans*, 69 Ga. 617; *Butler v. Ralston*, 69 Ga. 485; *Benton v. Paterson*, 8 Ga. 146; *Lessee of Miller v. Hurt*, 12 Ga. 357; *Pournell v. Harris*, 29 Ga. 736.

¹⁸ Missouri. *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Yocum v.*

to write back into the English law an estate tail in such form that it could not be barred by a common recovery.

§ 164. "Dying without issue"—Three theories prevail in the courts

So far as it is possible to group the cases in this country construing the phrase, "dying without issue" they may be grouped under three heads:

First: Those in which it is assumed that the expression "dying without issue" refers to the death of the devisee without issue in the lifetime of the testator. The gift over, in this case would be substitutory only, and if the devisee survived the testator he would take a fee simple.¹⁹

Parker, 134 Fed. 205, 67 C. C. A. 227; *Cox v. Jones*, 229 Mo. 53, 129 S. W. 495.

Arkansas. *Wheelock v. Simons*, 75 Ark. 19, 86 S. W. 830; *Mercantile Tr. Co. v. Adams*, 95 Ark. 333, 129 S. W. 1101.

Connecticut. *Borden v. Kingsbury*, 2 Root (Conn.) 40; *St. John v. Dann*, 66 Conn. 401-407, 34 Atl. 110.

Estates tail are not abolished in Kansas. *Ewing v. Nesbitt*, 88 Kan. 709, 129 Pac. 1131; *Lewis v. Barnhardt* (C. C.) 43 Fed. 854. See *Lewis v. Barnhardt*, 145 U. S. 56, 12 Sup. Ct. 772, 26 L. Ed. 621.

¹⁹ *Jones v. Webb*, 5 Del. Ch. 132; *Rickards v. Gray*, 6 Houst. (Del.) 232; *Hull v. Holmes*, 78 Conn. 362, 62 Atl. 705; *Strong v. Elliott*, 84 Conn. 665, 81 Atl. 1020; *St. John v. Dann*, 66 Conn. 401, 34 Atl. 110; *Phelps v. Phelps*, 55 Conn. 359, 11 Atl. 596; *Turner v. Balfour*, 62 Conn. 89, 25 Atl. 448; *Johnes v. Beers*, 57 Conn. 295, 18 Atl. 100, 14 Am. St. Rep. 101; *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468; *King v. Frick*, 135 Pa. 575, 19 Atl. 951, 20 Am. St. Rep. 889; *Mickley's Appeal*, 92 Pa. 514; *McCormick v. McElligott*, 127 Pa. 230, 17 Atl. 896, 14 Am. St. Rep. 837; *Biddle's Estate*, 28 Pa. 59; *Smith v. Smith*, 139 Ala. 406, 36 South. 616; *Phelps v. Robbins*, 40 Conn. 250;

When in a will an estate in fee is followed by an apparently inconsistent limitation, the whole should be reconciled by reading the latter disposition as applying exclusively to the event of the prior devisee in fee dying in the lifetime of the testator—the intention of the testator being, it is considered, to provide a substituted devisee in case of a lapse.²⁰

Second: Those in which it is assumed that the failure of issue meant is an indefinite failure of issue, and hence that the first devisee takes a fee tail.²¹

Coe v. James, 54 Conn. 511, 9 Atl. 392; *White v. White*, 52 Conn. 518; *Webb v. Lines*, 57 Conn. 154, 17 Atl. 90; *Lawlor v. Holohan*, 70 Conn. 87, 38 Atl. 903; *Stone v. McEckron*, 57 Conn. 194, 17 Atl. 852; *First Nat'l Bank v. De Pauw*, 86 Fed. 722, 30 C. C. A. 360 (Ind.), reversing (C. C.) 75 Fed. 775; *Bartlett v. Bartlett*, 33 Ga. Supp. 172-179.

²⁰ *Walsh v. McCutcheon*, 71 Conn. 283-287, 41 Atl. 813; *Hollister v. Butterworth*, 71 Conn. 57, 40 Atl. 1044.

²¹ *Hollett's Lessee v. Pope*, 3 Har. (Del.) 542; *Caulk v. Caulk*, 3 Pennewill (Del.) 528, 52 Atl. 340; *James' Claim*, 1 Dall. 47, 1 L. Ed. 31; *McColley v. Lampleugh*, 3 Houst. (Del.) 461; *Allyn v. Mather*, 9 Conn. 124; *Williams v. McCall*, 12 Conn. 330; *Larabee v. Larabee*, 1 Root (Conn.) 556; *Comstock v. Comstock*, 23 Conn. 349-351; *Smith v. Pendell*, 19 Conn. 111, 48 Am. Dec. 146; *Turrill v. Northrop*, 51 Conn. 33; *Chesebro v. Palmer*, 68 Conn. 207, 36 Atl. 42; *Pearsal v. Maxwell*, 76 Fed. 428, 22 C. C. A. 262 (Pa.); *Thresher's Appeal*, 74 Conn. 40, 49 Atl. 861; *Moody v. Walker*, 3 Ark. 147; *Williamson v. Daniel*, 12 Wheat. 568, 6 L. Ed. 731; *Myrick v. Heard*, 31 Fed. 241 (Ga.); *Wiley v. Smith*, 3 Ga. 551.

A limitation of property after an indefinite failure of issue is void, and to make an executory devise good to a second legatee the gift to the first taker must be restricted to a life interest or must be something less than an absolute gift. *Slaughter v. Slaughter*, 23 Ark. 356, 79 Am. Dec. 111; *Watkins v. Quarles*, 23 Ark. 179; *Robinson v. Bishop*, 23 Ark. 378; *Moody v. Walker*, 3 Ark. 147-198; *Clark v. Stanfield*, 38 Ark. 347; *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136; *Carlton v. Price*, 10 Ga. 495; *Strong v. Middleton*, 51 Ga. 462-465; *Holt v. Wilson*, 82 Kan. 268-274, 108 Pac. 87.

The old English rule was that a limitation over, if the first devisee should die without issue, created an estate tail by implication only if an indefinite failure of issue was intended. That such was the testator's intention, was, however, presumed, if the first devise were made either in fee, or for life, or generally without any particular limit as to its duration. *Macchell v. Weeding*, 8 Sim. 4. The courts of this State, while adopting the same rule, have not admitted the existence of the presumption upon which it was based by the English law. On the contrary they have always construed the words "dying without issue," if not otherwise explained in the context, as referring to a dying without leaving issue living at the time of such death (*Hudson v. Wadsworth*, 8 Conn. 348-360). This difference between the views of the English courts and those of Connecticut is, no doubt, attributable to the effect of an ancient principle in our jurisprudence, confirmed by the Statute of 1784, that an estate tail becomes an estate in fee simple in the issue of the first donee in tail. Under this rule, a strict limitation in tail, to endure from generation to generation, was impossible and an attempt to constitute it was therefore not to be presumed. There is no difference between the common law of England and that of this State in reference to the creation of a remainder after an estate tail in land. An estate tail is a particular estate, which when carved out of an estate in fee simple, leaves something remaining, which is a proper subject of immediate disposition. *Hall v. Priest*, 6 Gray (Mass.) 18-20.

A devise in tail might be followed at common law, by a devise in remainder, contingent upon the death of the devisee in tail without leaving issue surviving him at the time of his decease. This simply prescribed a particular mode for the termination of the estate in tail. *Ex parte Daviss*, 2 Sim. (N. S.) 104.²²

²² *St. John v. Dann*, 66 Conn. 401-407, 34 Atl. 110.

"It is a principle of the common law to which the English courts have always adhered with great tenacity that a fee cannot be limited after a fee. Thus when by deed land is conveyed to one in fee,

Third: Those in which it is assumed that the failure of issue meant is a failure at the death of the first devisee, and hence that he takes a conditional

with a limitation over to another upon the happening of a particular event, the limitation over is void. But in a will, for the purpose of giving effect to the intention of the testator, such a limitation is held to the good as an executory devise. Executory devises are not favored in law, and the English judges have gone great lengths to construe the estate in the first devisee to be less than a fee, so as to give effect to the limitation over as a contingent remainder. Thus where land is devised to A and his heir, but in case A should die without issue then to B and his heirs, they construe the words "die without issue" to mean an indefinite failure of issue, and not a failure at the time of the death of A, thereby giving A an estate tail by implication, and giving effect to the limitation over to B as a contingent remainder. And it is only when the language used clearly requires it that they construe such words to mean a failure at the death of the first devisee, as such a construction gives the first devisee a fee, and allows the second to take only by way of an executory devise. But our own courts have been less rigid in the construction of wills of this character." *Bullock v. Seymour*, 33 Conn. 289-293.

When a devise can be construed as a remainder it will never be construed as an executory devise. Therefore a devise to two brothers with provision that on dying without issue the share shall go to survivor and on survivor dying without issue to others, is held to be a life estate in each, with cross remainders if life estate, and contingent remainder over. *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094 (Ohio).

"Dying without issue" construed life estate followed by contingent remainder in children, if any. *Stone v. Franklin*, 89 Ga. 195, 15 S. E. 47; *Haddock v. Perham*, 70 Ga. 573; *Wetter v. U. H. C. P. Co.*, 75 Ga. 540; *O'Bryne v. Feeley*, 61 Ga. 77; *Gaboury v. McGovern*, 74 Ga. 133; *Cochran v. Cochran*, 43 Tex. Civ. App. 259, 95 S. W. 731.

Estate for life with contingent remainder to his children if he have any, and executory devise over on failure of children. Rule in *Wild's case*, 6 Reports 17 (41 Elizabeth 1599), that where lands are devised to a person and his children, and he has no children at the time of the devise the parent takes an estate tail, is not followed in Georgia because estates tail are abolished. *Miller's Lessee v. Hurt*, 12 Ga. 357-359.

fee.²³ This is also a rule established by statute in some states.²⁴

²³ *Abbott v. Essex Co.*, 18 How. 202, 15 L. Ed. 352; *Robinson v. Adams*, 4 Dall. App'x xii, 1 L. Ed. 920; *Jackson v. Chew*, 12 Wheat. 153, 6 L. Ed. 583; *Gannon v. Pauk*, 200 Mo. 75, 98 S. W. 471; *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208; *Jewell v. Pierce*, 120 Cal. 79-84, 52 Pac. 132; *Estate of Blake*, 157 Cal. 448-472, 108 Pac. 287; *Estate of Carothers*, 161 Cal. 588, 119 Pac. 926; *Cronin's Estate*, Myr. Prob. 252; *Holmes v. Williams*, 1 Root (Conn.) 335-340, 1 Am. Dec. 49; *Morgan v. Morgan*, 5 Day (Conn.) 517-520; *Couch v. Gorham*, 1 Conn. 36; *Hudson v. Wadsworth*, 8 Conn. 348; *Bullock v. Seymour*, 33 Conn. 289; *Alfred v. Marks*, 49 Conn. 473; *Hollister v. Butterworth*, 71 Conn. 57, 40 Atl. 1044; *Harrington v. Roe*, 1 Houst. (Del.) 398; *Cooper v. Townsend*, 1 Houst. (Del.) 365; *Dooling v. Hobbs*, 5 Har. (Del.) 405; *Russ v. Russ*, 9 Fla. 105; *Benton v. Patterson*, 8 Ga. 146; *Phinizy v. Few*, 19 Ga. 66; *Clements v. Glass*, 23 Ga. 395; *Payne v. Rosser*, 53 Ga. 662; *Daniel v. Daniel*, 102 Ga. 181; *Gibson v. Hardaway*, 68 Ga. 370; *Robertson v. Johnston*, 24 Ga. 102; *Groce v. Ritzenberry*, 14 Ga. 233.

O'Mahoney v. Burdett, L. R. 7 H. L. 388; *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816; *Briggs v. Shaw*, 9 Allen (Mass.) 516; *Summers v. Smith*, 127 Ill. 649, 21 N. E. 191; *Smith v. Kimbell*, 153 Ill. 378, 38 N. E. 1029; *In re N. Y., L. & W. Ry. Co.*, 105 N. Y. 95, 11 N. E. 492, 59 Am. Rep. 478; *Shadden v. Hem-bree*, 17 Or. 25, 18 Pac. 572; *Parish's Heirs v. Ferris*, 6 Ohio St. 563; *Moore v. Moore*, 12 B. Mon. (51 Ky.) 651; *Daniel v. Thomson*, 14 B. Mon. (53 Ky.) 662.

Harris v. Smith, 16 Ga. 545; *Chewning v. Shumate*, 106 Ga. 751, 32 S. E. 544; *Smith v. Usher*, 108 Ga. 231, 33 S. E. 876; *Hill v. Terrell*, 123 Ga. 49, 51 S. E. 81; *Tyler v. Theilig*, 124 Ga. 204, 52 S. E. 606; *Kinard v. Hale*, 128 Ga. 485, 57 S. E. 761; *Maynard v. Greer*, 129 Ga. 709, 59 S. E. 798; *Satterfield v. Tate*, 132 Ga. 256, 64 S. E. 60; *Phinizy v. Wallace*, 136 Ga. 520-525, 71 S. E. 896; *McCune v. Goodwillie*, 204 Mo. 306-337, 102 S. W. 997; *Tebow v. Dougherty*, 205 Mo. 315, 103 S. W. 985; *Chase v. Gregg*, 88 Tex. 552, 32 S. W. 520; *St. Paul's Sanitarium v. Freeman*, 102 Tex. 376, 117 S. W. 425, 132 Am. St. Rep. 886; *Yoesel v. Rieger*, 75 Neb. 180, 106 N. W. 428; *Schnitter v. McManaman*, 85 Neb. 337, 123 N. W. 299, 27 L. R. A. (N. S.) 1047.

²⁴ *Waring v. Jackson*, 1 Pet. 570, 7 L. Ed. 266 (N. Y.); *Yocum v.*

The question then arises does the estate of the first devisee become absolute upon his having issue, or does it remain conditional during his lifetime and become absolute only upon his leaving issue at that time? The latter would seem to be the logical rule.²⁵ The holder of this conditional or defeasible fee can convey his fee and such conveyance is good against his issue if he have any, but is not good against the one who takes by way of executory devise on the failure of issue.²⁶ The devise over, on failure of issue is held to be good as an executory devise.

Parker, 134 Fed. 205, 67 C. C. A. 227 (Mo.); Yocum v. Siler, 160 Mo. 281, 61 S. W. 208.

²⁵ Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816; Yoesel v. Rieger, 75 Neb. 180, 106 N. W. 428; Pearce v. Pearce, 104 Tex. 73, 134 S. W. 210.

²⁶ "The result is that Wm. F. Yocum took an estate in fee simple subject to its divestment in the event that he left no legitimate issue; but that, having left such issue, his title became an absolute one, which passed to his grantees." Yocum v. Parker, 134 Fed. 205-210, 67 C. C. A. 227; St. John v. Dann, 66 Conn. 401-410, 34 Atl. 110.

"Die without lawful children" with remainder over. Held the remainder could not be defeated by adoption of child. Cochran v. Cochran, 43 Tex. Civ. App. 259, 95 S. W. 731.

It was said by Judge Gantt that the much litigated case of the Yocum will, established as a *rule of property* in Missouri that "dying without issue" created a defeasible fee, followed by an executory devise. But, alas, this "rule of property" did not remain established. In a later case "dying without issue" were held to create a *life estate* in the first devisee, with a remainder (contingent?) in those to whom the estate is given over. Armor v. Frey, 226 Mo. 646-687, 126 S. W. 483.

In distinguishing this case from Yocum v. Siler, 160 Mo. 281, 61 S. W. 208, Judge Fox says: "It will be observed that the devise over in that case was, as said by the court, conditional, and rested upon a *single* contingency that never happened; hence it followed that that

§ 165. "What remains"

Much difficulty has arisen from the careless use by testators, following a general bequest of personal property, or of a mixed estate of real and personal property, of the expression "what remains," or kindred words indicating that some portion of the bequest is to go to others on the death of the first legatee. The bequest, usually, is one made to a wife or husband and those who are to take the undisposed of property usually are the descendents or others within the natural range of the testator's bounty. It was early determined that a gift over of such part of the personal estate as his wife should leave at her decease was valid,²⁷ and this decision has been followed repeatedly in this country.²⁸ The

clause of the will concerning that *single* contingency was inoperative, and it was properly held in our opinion, that that clause was insufficient to limit the absolute estate given in the first instance to that of a life estate. In this case the contingency is *double*, that is, of either dying *with or without issue*." This refined distinction between a single contingency and a double contingency reminds me of the fortunate man who said he had three changes of clothes—put on, take off and go without!

Still later the supreme court of Missouri held that the words "dying without bodily heirs" created a fee tail. *Cox v. Jones*, 229 Mo. 53, 129 S. W. 495.

So you can take your choice: First. Conditional fee followed by executory devise. *Yocum v. Siler*, 160 Mo. 281, 61 S. W. 208. Second. Life estate, followed by a remainder (contingent?). *Armor v. Frey*, 226 Mo. 646-687, 126 S. W. 483. Third. Fee tail. *Cox v. Jones*, 229 Mo. 53, 129 S. W. 495.

²⁷ *Upwell v. Halsey*, 1 P. Wms. 651 (1720).

²⁸ The following are cases in which the first taker was given the right to use and absolutely dispose of the property, in which a legal

courts have endeavored in each of such cases to arrive at the real intention of the testator; and, with the aid of scientific rules of construction to read some sense into language which is often contradictory and confusing. Sometimes the testator gives to the first taker what is clearly a life estate, and then adds a clause to the effect that, "what remains" of the property, or "if any of said property be left," after the death of the first taker, it shall go to the others. Some authorities hold that such expressions do not, by implication, necessarily confer a power of disposition on the first taker.²⁹ If the property devised is mixed, both real and personal, such words may as well imply that some of it may be consumed or lost, as that it may be sold. But the language of the will *may* be so strong as to show, from such a provision,

or equitable estate was given in so much as might remain at the death of the first taker to another person: *McMurry v. Stanley*, 69 Tex. 227-233, 6 S. W. 412; *Smith v. Bell*, 6 Pet. 68, 8 L. Ed. 322; *Wager v. Wager*, 96 N. Y. 164; *Anderson v. Hall*, 80 Ky. 91; *Flickinger v. Saum*, 40 Ohio St. 591; *Hamlin v. Express Co.*, 107 Ill. 448; *Terry v. Wiggins*, 47 N. Y. 512; *Smith v. Van Ostrand*, 64 N. Y. 278; *In re Estate of Nichols*, 93 Neb. 80, 139 N. W. 719; *Smullin v. Wharton*, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441; *Id.*, 86 Neb. 553, 125 N. W. 1112.

Such provisions were void by the early law of Texas. A bequest to one with a limitation of what remains at his death to another held to be a *fidei-commissa* and void under the Spanish and Mexican law, and that the bequest become absolute in the first taker. *Gortario v. Cantu*, 7 Tex. 35.

²⁹ *Bramell v. Adams*, 146 Mo. 80, 47 S. W. 931; *Bramell v. Cole*, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619; *Foote v. Sanders*, 72 Mo. 616.

that the testator intended to give the first devisee power to sell the land.³⁰

Where the gift is expressed to be for life, the superadded power of disposal, either expressed or implied from the gift over of what remains at the death of the first taker, has been held not to enlarge the life estate into an absolute interest.³¹ But the authorities are not agreed on this, and such expressions as "what remains at the death of my wife," following a life estate, have been held to enlarge such estate to a fee.³²

Another phase of the difficulty is where such words follow a devise which is sufficient in itself to vest an absolute title in the devisee. It is held in such case that a gift over of "what remains" does not by implication cut down a fee to a life estate.³³ Such provisions are held to be repugnant to the absolute gift and therefore void.³⁴ But even this proposition has not escaped conflict of decision.³⁵

³⁰ *Underwood v. Cave*, 176 Mo. 18, 75 S. W. 451.

³¹ *Hardy v. Mayhew*, 158 Cal. 95, 110 Pac. 113, 139 Am. St. Rep. 73; *Mansfield v. Shelton*, 67 Conn. 390, 35 Atl. 271, 52 Am. St. Rep. 285; *Adams v. Lillibridge*, 73 Conn. 655, 49 Atl. 21; *Weathers v. Patterson*, 30 Ala. 404; *Robertson v. Johnston*, 24 Ga. 102.

³² *Elyton Land Co. v. McElrath*, 53 Fed. 763, 3 C. C. A. 649; *Rutledge v. Crampton*, 150 Ala. 275, 43 South. 822.

³³ *Roth v. Rauschenbusch*, 173 Mo. 582, 73 S. W. 664, 61 L. R. A. 455; *Young v. Robinson*, 122 Mo. App. 194, 99 S. W. 20.

³⁴ *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575, 27 L. Ed. 1089; *Flinn v. Davis*, 18 Ala. 132; *Hovey v. Walbank*, 100 Cal. 192, 34 Pac. 650; *McKenzie's Appeal*, 41 Conn. 607, 19 Am. Rep. 525; *Trustees*

³⁵ *Williams v. McKinney*, 34 Kan. 514, 9 Pac. 265.

§ 166. "What remains"—Necessity for clearness of expression

The confusion on this subject is not due to conflicting opinions of the courts so much as it is to a real confusion existing in the mind of the testator. The courts do their best to arrive at and effectuate the intention of the testator, but in reading the cases, we find it hard to escape the conviction that the testator himself did not know what he was talking about. This confusion seems to arise from the fact that the testator either did not know, or did not keep in mind the simple rules of law governing the vesting of estates. He did not realize that when he dies he ceases to own or have dominion over any property. The title to what was once his vests in some one else. The law permits him, in the interest of public policy, to create certain estates in harmony with the general rules of law; but does not

of *Methodist Church v. Harris*, 62 Conn. 93, 25 Atl. 456; *Browning v. Southworth*, 71 Conn. 224, 41 Atl. 768; *Atty. Gen'l v. Hall*, Fitzg. 114; *Jackson v. Bull*, 10 Johns. (N. Y.) 20; *Ramsdell v. Ramsdell*, 21 Me. 288; *Harris v. Knapp*, 21 Pick. (Mass.) 416; *Homer v. Shelton*, 2 Metc. (Mass.) 202; *Lynde v. Estabrook*, 7 Allen (Mass.) 68; *Fiske v. Cobb*, 6 Gray (Mass.) 144; *McNutt v. McComb*, 61 Kan. 29, 58 Pac. 965.

Devise with power of disposition and devise over of what remains undisposed of in case of her death without issue. Held she took a fee and devise over was void for repugnancy. *Spencer v. Scovil*, 70 Neb. 87-97, 96 N. W. 1016; *Attorney General v. Hall*, Fitzg. (Eng.) 314; *Jackson v. Bull*, 10 Johns. (N. Y.) 19; *Ide v. Ide*, 5 Mass. 500.

The controlling feature of these cases is the unlimited power of disposal in the first taker, gathered from the words of the will, which implies a fee and renders the devise over repugnant and void.

permit his dead hand to fetter, in a wholly arbitrary way, what is then the property of the living. He may carve out life estates, followed by remainders, vested or contingent; he may create a life estate with power to dispose of the fee; he may create a fee simple estate, which is now presumed from an unqualified gift; he may even create executory devises or vest the title in trustees upon specific trusts; but some one besides himself is to be the owner of that property. The title vests somewhere. He cannot have his cake and eat it too. This seems to be a hard thing for testators to realize, but the draftsman of a will fails in his duty if he does not point out plainly to the testator that he must make some clear-cut disposition of his property which can be enforced in harmony with the rules of law.

§ 167. Analysis of the estate given by such provisions

Not many of the decisions have analysed very closely the exact nature of the estates given to the first taker, and to those subsequently entitled, being content to dispose of the whole question by a sweeping use of the rather misleading term "executory devise" as applied to all future interests in personal estate. As far as the first legatee is concerned an exact definition of his legal status is not very important to him, except where he claims the right to sell land without express authority of the will. Then it is important to determine whether he took

a fee, or took a life estate with power to dispose of the fee, or a life estate with the power only of use and consumption. But the nature of the preceding estate is always important to those who are to take the undisposed of surplus, as it indicates the exact nature of their own estate. These gifts may assume the following form:

First: The gift may be a life estate in the first taker, accompanied by a power of disposal, more or less broad according to the testator's intention as expressed or implied in the will. Such an estate would be followed by a remainder in the undisposed of property, which remainder would be vested or contingent according as the remaindermen were or were not definitely ascertained.³⁶

In this case the remaindermen are, of course, defeated of their rights by any disposition of the property made by the life tenant under the authority contained in the will.³⁷

Second: The gift may be of a fee to the first taker accompanied by a trust, by precatory words

³⁶ *Greenwalt v. Keller*, 75 Kan. 578, 90 Pac. 233; *Melton v. Camp*, 121 Ga. 693, 49 S. E. 690; *Edgar v. Emerson*, 235 Mo. 552, 139 S. W. 122; *Threlkeld v. Threlkeld*, 238 Mo. 459, 141 S. W. 1121; *Gibson v. Gibson*, 239 Mo. 490-505, 144 S. W. 770 (overruling *Papin v. Piednoir*, 205 Mo. 521, 104 S. W. 63, and *Jackson v. Littell*, 213 Mo. 589, 112 S. W. 53, 127 Am. St. Rep. 620).

³⁷ Life estate in widow with power to consumption inferred from gift over of "what remains."

Widow not bound to account for personal property expended. In *re Estate of Nichols*, 93 Neb. 80, 139 N. W. 719.

or otherwise, in the undisposed of balance for the benefit of the ultimate beneficiaries.³⁸

In this case the remedy of the beneficiaries against the representatives of the life tenant is in equity, and it seems to me this is a more convenient and satisfactory remedy in all such cases.

In any case the life tenant is entitled to have the entire property turned over to him on the distribution of the estate.³⁹

³⁸ *King v. Bock*, 80 Tex. 156-166, 15 S. W. 804.

"We know of no inflexible rule of law forbidding Mrs. Bagley to so dispose of her property by will as to vest the entire legal estate in her husband, with power in him to use or dispose of any or all of it during his lifetime, even for his own benefit, and at the same time to vest an equitable estate in what might remain at his death in her nieces, and to confer upon her husband the power and to make it his duty by will or otherwise to vest the legal estate in such remaining property, at his death, in them. If she had provided in express terms in her will that the part of her estate remaining at the time of her husband's death should go to the persons named in the fourth paragraph, then a legal estate therein would have vested in them under the will; but this she did not." Held that the nieces had an equitable title by virtue of a precatory trust in what remained and it was duty of husband to will them the legal title. *McMurry v. Stanley*, 69 Tex. 227-233, 6 S. W. 412.

³⁹ *Estate of Mayhew*, 4 Cal. App. 162, 87 Pac. 417.

Where will provides for support and maintenance for the widow out of the estate, remainder to others, the court may by decree fix the amount of such support. *Smullin v. Wharton*, 83 Neb. 328, 119 N. W. 773, 121 N. W. 441.

CHAPTER XI

TRUST ESTATES

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CHARITABLE OR PUBLIC TRUSTS

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§ 168. Trust estates—Their purpose in wills

Trusts in one form or another are of frequent occurrence in wills. There seems to be a strong and almost universal desire implanted in the human breast to control and dictate the management of property after one's death. Often no better reason exists for this than the fact that the testator has once had dominion over the property. As the right

to dispose of property by will is the creature of positive law, it is well within the power of the law to determine how far it will permit such testamentary control. A clear-cut public policy forbids unnecessary and unreasonable restraints upon alienation, and upon the vesting of estates, and in this regard it matters not whether such restrictions are in the form of conditions or in the form of trusts.

A trust is, however, the more effective mode of continuing the control of the testator over his former property, and is often a very useful and provident arrangement.¹ Under the device of a trust a variety of objects can be accomplished: support can be provided for minors, incompetents, married women and spendthrifts; charities can be established, and the plan of their operation designated; annuities can be granted; debts and encumbrances can be cleared off; the estate can be kept intact during the continuance of a life estate in the testator's widow or others. So, also, the administration of the estate can be continued beyond the time given by statute so as to protect the property from sacri-

¹ *Woolverton v. Johnson*, 69 Kan. 708, 77 Pac. 559; *Dulin v. Moore*, 96 Tex. 135, 70 S. W. 742.

Trusts compared with *fidei commissa* under the Roman law. *Gortario v. Cantu*, 7 Tex. 35.

Creation of a trust may postpone the vesting of the legal title but not of the equitable title. *Potter v. Couch*, 141 U. S. 296, 313, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Phipps v. Ackers*, 9 Cl. & Fin. 583; *Weston v. Weston*, 125 Mass. 268; *Nicoll v. Scott*, 99 Ill. 529; *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351.

fice or forced sale. In a well considered case in New York it was decided that a testamentary trustee may be empowered to continue the testator's business.² All such trusts are necessarily express trusts, and usually active, although the duties may be no more than collecting and paying over the income.³

Testamentary trusts fall, roughly, into four classes:

1. Trusts for charities, sometimes called public trusts.

2. Trusts for incompetents, including infants, married women and spendthrifts.⁴

3. Trusts to preserve life estates and contingent remainders.⁵

4. Trusts for accumulation.

§ 169. What is necessary to a valid trust

No higher degree of skill can be shown by the draftsman of a will than that required to draw a good trust. It is a two-edged sword that the tyro should handle with care, or let entirely alone. No more can be done in a work like this than to set

² *Thorn v. De Breteuil*, 86 App. Div. 410, 83 N. Y. Supp. 849.

³ *Pugh v. Hayes*, 113 Mo. 424, 21 S. W. 23; *Slater v. Rudderforth*, 25 App. D. C. 497.

⁴ *Hamilton v. Downs*, 33 Conn. 211; *Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900; *Parker v. Wilson*, 98 Ark. 553, 136 S. W. 981; *In re L'Hommedieu* (D. C.) 138 Fed. 606; *Hare v. Sisters of Mercy*, 105 Ark. 549, 151 S. W. 515.

⁵ *Hill v. Dade*, 68 Ark. 409, 59 S. W. 39.

a few danger signals near the most common pitfalls.

In the first place it should be remembered that when a man dies he ceases to be the owner of his property. All the title, both legal and equitable, must vest in some one else. The equitable title is flexible and may come into existence in the future or upon a contingency; but the legal title is rigid. It cannot remain suspended in the air but must vest in some one capable of taking immediately and continuously. One of the most common omissions in wills is the neglect to provide for the vesting of the legal title; which omission is remedied by the courts, as far as possible, by the rule that the legal title to real property, not otherwise disposed of, vests in the heir at law, while the legal title to personal property vests primarily in the executor.

To the constitution of every valid express trust it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose, and a legal term. While equity will in certain instances make good the lack of the first requisite, if the second or third be lacking, or the fourth or fifth be illegal the trust itself must fail.⁶

It is necessary, then, that the draftsman of a will, in attempting to create a trust, should point out with sufficient clearness not only the property which is to be the subject matter, but also the ob-

⁶ In *re Walkerly*, 108 Cal. 627-650, 41 Pac. 772, 49 Am. St. Rep. 97; *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29.

jects and purposes thereof. The beneficiaries should be designated by name if possible. If they consist of a class, such as "children," "nephews," "surviving heirs," etc., the time at which the membership of the class is to be determined should be exactly stated. The designation of the trustee is the least important matter, as equity will never allow a trust to fail for want of a trustee,⁷ but if discretionary powers are to be exercised the trustee should not only be named, but provision made for the appointment of his successor⁸ and that the discretionary powers shall pass to and be exercised by the successor, if such be the intention. In any event the trustee should be clothed with sufficient express powers to carry out the purposes of the trust, as to sell land and execute the necessary contracts and conveyances therefor; to execute mortgages and readjust encumbrances; to sell, invest and re-invest personal property, etc.⁹

⁷ *Willis v. Alvey*, 30 Tex. Civ. App. 96, 69 S. W. 1035.

⁸ *May v. May*, 167 U. S. 310, 17 Sup. Ct. 824, 42 L. Ed. 179; *Wilcox's Appeal*, 54 Conn. 320, 8 Atl. 136.

⁹ *Massey v. Stout*, 4 Del. Ch. 274.

Power of sale in trustee is limited to the purposes expressed. *Beers v. Narramore*, 61 Conn. 13, 22 Atl. 1061.

Powers of testamentary trustees may be made ample. *Duckworth v. Ocean S. S. Co.*, 98 Ga. 193, 26 S. E. 736.

§ 170. Limitation of trust powers

Again, testators frequently lose sight of the fact that the unlimited power of control which they enjoy over their property in their life time, and the wide latitude of discretion with which they can deal with the altered circumstances of the various recipients of their bounty does not survive their death. Upon the death of the testator, new titles arise, the property has new owners, and the law must deal with the rights of these new owners according to established principles. If the testator desires to control those rights he must state his intention clearly and within the limits which the law permits. A trustee, as such, has by law very few rights, very limited powers, and practically no discretion. He must point to the trust instrument, the will, for such powers as he may exercise, and especially is this so if the power involves a discretion.¹⁰ It is true that the will may, by clear terms, commit a discretion to the trustee; as, for example, how

¹⁰ *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453; *Jamison v. McWhorter*, 7 Houst. (Del.) 242, 31 Atl. 517; *Beach v. Beers*, 80 Conn. 459, 68 Atl. 990; *Reed v. Reed*, 80 Conn. 401, 68 Atl. 849; *Conn. Tr. Co.'s Appeal*, 80 Conn. 540, 69 Atl. 360; *Clement's Appeal*, 49 Conn. 519; *Marx v. Clisby*, 126 Ala. 107, 28 South. 388; *Owen v. Reed*, 27 Ark. 122; *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094; *Haldeman v. Openheimer*, 103 Tex. 275, 126 S. W. 566; *Byron Reed Co. v. Klabunde*, 76 Neb. 801, 108 N. W. 133; *Clark v. Fleischmann*, 81 Neb. 445, 116 N. W. 290.

Neither good faith nor the oral advice of the probate court will protect a trustee in disregarding the terms of his trust. *State v. Thresher*, 77 Conn. 70, 58 Atl. 460.

much of a fund he may use for the beneficiaries' support.¹¹ But the discretion is rather narrowly construed, is usually personal to the individual named as trustee,¹² and can in no case extend beyond the circumstances foreseen and provided for by the testator. Each passing moment, the great kaleidoscope of life swings around, throwing circumstances into an infinite variety of combinations which no human mind can foresee. Trustees cannot have the same latitude in managing the estate that the testator would have had, nor can the courts of equity give it to them.¹³

¹¹ *Haydel v. Hurek*, 72 Mo. 253, reversing 5 Mo. App. 267; *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968; *Keeler v. Lauer*, 73 Kan. 396, 85 Pac. 541; *Russell v. Hartley*, 83 Conn. 654, 78 Atl. 320; *Sterling v. Ives*, 78 Conn. 498, 62 Atl. 948.

Trustees having the power to exercise discretion will not be interfered with by a court of equity at the instance of the beneficiaries so long as they are acting in good faith. *Shelton v. King*, 229 U. S. 90, 33 Sup. Ct. 686, 57 L. Ed. 1086.

¹² *Whitaker v. McDowell*, 82 Conn. 195, 72 Atl. 938, 16 Ann. Cas. 324; *Johnson v. Childs*, 61 Conn. 66, 23 Atl. 719; *Security Co. v. Snow*, 70 Conn. 288, 39 Atl. 153, 66 Am. St. Rep. 107; *Partee v. Thomas (C. C.)* 11 Fed. 769; *Markel v. Peck*, 144 Mo. App. 701, 129 S. W. 243.

¹³ *Stevens v. De La Vaulx*, 166 Mo. 20, 65 S. W. 1003; *West v. Bailey*, 196 Mo. 517, 94 S. W. 273; *Lanyon Z. Co. v. Freeman*, 68 Kan. 691, 75 Pac. 995, 1 Ann. Cas. 403.

A testator may limit the extent of power conferred by him and prescribe the particular manner of executing it, and the agent is as little able to vary the manner as to transcend the limit, for in either case he would be found usurping instead of executing authority. *Mackay v. Moore*, Dud. (Ga.) 94.

It has been held in Missouri that trustees might make a donation to a public enterprise for the benefit of the estate. *Drake v. Crane*, 127 Mo. 85, 29 S. W. 990, 27 L. R. A. 653.

§ 171. Testamentary trust distinguished from trust deed

It is always possible to create a trust by a trust deed or declaration of trust, executed, delivered and taking effect during the lifetime of the maker.¹⁴ But this is totally distinct from a testamentary trust. The latter must be found in the will and its terms should be fully embraced therein. It takes effect when the will takes effect, and the trustee is a devisee or legatee under the will, deriving his rights in the usual way like other devisees, subject to the probate of the will and the settlement and distribution of the estate. An attempt to appoint trustees directly, without the intervention of administration, is void.¹⁵ So all attempts to create trusts by instructions, verbal or written, to the alleged trustees, *dehors* the will are discouraged.¹⁶

¹⁴ *Shields v. McAuley* (C. C.) 37 Fed. 302. Power to make a voluntary deed in trust, to be executed after death, with express reservation of power of revocation. *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 50 Am. St. Rep. 43; *Sims v. Brown*, 252 Mo. 58, 158 S. W. 624.

Where a father made a deed of all of his property to his son as trustee for the father's heirs, thus avoiding administration, an administrator appointed for the father's estate may sue to set aside the deed for undue influence and lack of capacity. *Griesel v. Jones*, 123 Mo. App. 45, 99 S. W. 769.

¹⁵ *Hunter v. Bryson*, 5 Gill & J. (Md.) 483-488, 25 Am. Dec. 313; *Wall v. Bissell*, 125 U. S. 382-388, 8 Sup. Ct. 979, 31 L. Ed. 772.

Attempted trust for benefit of heir not sustained. *Crowley v. Crowley*, 131 Mo. App. 178, 110 S. W. 1100.

¹⁶ *Colbert v. Speer*, 24 App. D. C. 187.

Where a bequest is made for a purpose "named in a sealed letter" which letter was refused probate as not being properly incorporated

§ 172. Trusts *ex maleficio*

If a testator is induced either to make a will or not to change one after it is made, by a promise, express or implied on the part of the legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created and equity will compel him to apply property thus obtained in accordance with his promise. The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who induce their ancestor, or relative, not to make a will by promising in case of intestacy to dispose of the property or a part of it in the manner indicated by him. The rule is founded on the principle that the legacy would not have been given or intestacy allowed to ensue unless the promise had been made, and hence the person promising is bound in equity to keep it, as to violate it would be fraud.¹⁷ The rule does not interfere with the

in the will; the letter cannot be set up as a declaration of trust binding on the residuary legatees. *Bryan v. Bigelow*, 77 Conn. 604, 60 Atl. 266, 107 Am. St. Rep. 64; *Heidenheimer v. Bauman*, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29.

¹⁷ *Trustees of Amherst College v. Ritch*, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 321; *Williams v. Fitch*, 18 N. Y. 546; *Parker v. Urie*, 21 Pa. 305; *Hooker v. Axford*, 33 Mich. 453; *Bennett v. Harper*, 36 W. Va. 546, 15 S. E. 143; *O'Hara's Will*, 95 N. Y. 403, 47 Am. Rep. 53; *Ahrens v. Jones*, 169 N. Y. 555, 62 N. E. 667, 88 Am. St. Rep. 620; *Owing's Case*, 1 Bland (Md.) 370, 17 Am. Dec. 338; *Grant v. Bradstreet*, 87 Me. 583, 33 Atl. 165; *Brook v. Chappell*, 34 Wis. 405; *Mead v. Robertson*, 131 Mo. App. 185, 110 S. W. 1095; *Cooney v. Glynn*, 157 Cal. 583, 108 Pac. 506; *Cassells v. Finn*, 122 Ga. 33, 49

probating of the will or with the course of descent and distribution in case of intestacy. The remedy of the intended beneficiary is to hold the legatee or heir as trustee ex maleficio on the ground of fraud in case he refuses to carry out the agreement. The trust thus created may be established by parol evi-

S. E. 749, 68 L. R. A. 80, 106 Am. St. Rep. 91, 2 Ann. Cas. 554; O'Donnell v. Murphy, 17 Cal. App. 625, 120 Pac. 1076; Edson v. Bartow, 154 N. Y. 218, 48 N. E. 541; O'Hara v. Dudley, 95 N. Y. 403, 47 Am. Rep. 53; Amherst College v. Ritch, 151 N. Y. 283-323, 45 N. E. 876, 37 L. R. A. 305; Dowd v. Tucker, 41 Conn. 203; Sellack v. Harris, 5 Vin. Abr. 521; Marriott v. Marriott, 1 Strange (Eng.) 666; Devenish v. Baines, Finch, Ch. Prec. 3; Barrow v. Greenough, 3 Ves. (Eng.) 151; Chamberlain v. Agar, 2 Ves. & Bea. (Eng.) 259; Mestaer v. Gillespie, 11 Ves. (Eng.) 638; Trustees of Amherst College v. Ritch, 151 N. Y. 282, 45 N. E. 876, 37 L. R. A. 305; Ransdel v. Moore, 153 Ind. 393, 53 N. E. 767, 53 L. R. A. 753 (authorities collected); Smullin v. Wharton, 73 Neb. 667, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267; Gemmel v. Fletcher, 76 Kan. 577, 92 Pac. 713, 93 Pac. 339; Larmon v. Knight, 140 Ill. 232, 29 N. E. 1116, 33 Am. St. Rep. 229; Brook v. Chappell, 34 Wis. 405; Kimball v. Tripp, 136 Cal. 631, 69 Pac. 428; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 431; Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157; Ragsdale v. Ragsdale, 68 Miss. 92, 8 South. 315, 11 L. R. A. 316, 24 Am. St. Rep. 256; Meredith v. Meredith, 150 Ind. 299, 50 N. E. 29; Giffen v. Taylor, 139 Ind. 573, 37 N. E. 392; Gilpatrick v. Glidden, 81 Me. 137, 16 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245; In re Will of O'Hara, 95 N. Y. 403, 47 Am. Rep. 53.

Where testator intended to make will and was fraudulently induced to make deed, the instrument may be cancelled in equity. Carter v. Wariden, 136 Ga. 700, 71 S. E. 1047.

Letter by testator to devisee stating certain trusts, upon which devise is made, with acceptance by devisee in writing creates a valid trust which equity will enforce, though not specified in will. De Laurence v. De Boom, 48 Cal. 581; Curdy v. Berton, 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157.

dence,¹⁸ although some cases distinguish in this regard between the fraudulent promise of a devisee and the promise of an heir. The distinction is made that the heir takes the title by descent and not by virtue of a will and therefore his oral promise in derogation of the title which the law casts upon him is void as a verbal trust.¹⁹ In all of these cases of trusts *ex maleficio* the will is entitled to probate and goes into force according to its terms, leaving to an independent suit in equity the enforcement of the alleged trust.²⁰

¹⁸ *Cassells v. Finn*, 122 Ga. 33, 49 S. E. 749, 68 L. R. A. 80, 106 Am. St. Rep. 91, 2 Ann. Cas. 554; *Oldham v. Litchfield*, 2 Vern. 506; *Thynn v. Thynn*, 1 Vern. 296; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Williams v. Fitch*, 18 N. Y. 546; *Church v. Ruland*, 64 Pa. 432; *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464, 2 L. R. A. 662, 10 Am. St. Rep. 245; *Hoge v. Hoge*, 1 Watts (Pa.) 163, 26 Am. Dec. 52; *Dixon v. Olmins*, 1 Cox Ch. 414; *Lantry v. Lantry*, 51 Ill. 458, 2 Am. Rep. 310; *Fischbeck v. Gross*, 112 Ill. 208; *Manning v. Pippen*, 95 Ala. 537, 11 South. 56; *Holcomb v. Gillett*, 2 Root (Conn.) 450.

Insufficient to show assumption or promise by devisee. *Jordan v. Abney*, 97 Tex. 296, 78 S. W. 486; *Overly v. Angel*, 84 Kan. 259, 113 Pac. 1041.

¹⁹ *Bedilian v. Seaton*, 3 Wall. Jr. 279, 3 Fed. Cas. 38; *Patton v. Beecher*, 62 Ala. 579.

Statute of Frauds provides: "VII. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June (1677) all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

²⁰ *In re Sharp*, 17 Cal. App. 634, 120 Pac. 1079; *Estate of Everts*, 163 Cal. 449, 125 Pac. 1058; *Smullin v. Wharton*, 73 Neb. 667, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267.

Where no promise express or implied is made by the legatee, but the disposal of the property is left wholly to his discretion, there is no trust, even though the property may have been given him with the expectation that he will carry out a certain purpose and to enable him to do so. Whatever moral obligation there may be, no legal obligation rests upon him.²¹

§ 173. Trusts by precatory words

Trusts created by what are known as "precatory words" are found almost exclusively in wills. Precatory words are words of entreaty or wish as distinguished from words of command. They have often been held to be sufficient to raise a trust in favor of the object pointed out. On this subject the court has said:

Words of desire, request, recommendation or confidence in a will, addressed by a testator to a legatee whom he has the power to command, create no trust in favor of the parties, recommended, unless: (1) The intention of the testator to make the desire, request, recommendation or confidence imperative upon the legatee, so that he should have no option to comply or to refuse to comply with it, clearly appears from the whole will and the relation and circumstances of the testator when it was made; (2) unless the subject matter is certain; and (3) unless the beneficiaries are clearly designated. When

²¹ O'Donnell v. Murphy, 17 Cal. App. 625, 120 Pac. 1076; Amherst College v. Ritch, 151 N. Y. 283-323, 45 N. E. 876, 37 L. R. A. 305; Rowbotham v. Dunnett, 8 L. R. Ch. D. 430; McCormick v. Grogan, 4 L. R. Eng. & Ir. Ap. 82.

these three conditions exist a precatory trust may be created in favor of the parties recommended.²²

The real question to be determined in such case is whether looking at the entire context of the will, the testator intended to impose an obligation on the legatee to carry his wishes into effect, or intended to leave it to the legatee to act on them or not, at her discretion.²³

But expressions in a will showing that the gift is for the benefit of others will not always be regarded as indicating an intention to create a *trust*. Sometimes such expressions are merely indicative of the *motive* of the gift to the devisee.²⁴

²² Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; Peake v. Jamison, 6 Mo. App. 590; Hunter v. Stenbridge, 12 Ga. 192; Noe v. Kern, 93 Mo. 367, 6 S. W. 239, 3 Am. St. Rep. 544; Lines v. Darden, 5 Fla. 51; Reeves v. Baker, 18 Beav. 372; Hood v. Oglander, 34 Beav. 513; Blakeney v. Blakeney, 6 Sim. 52; Cole v. Littlefield, 35 Me. 439; Smullin v. Wharton, 73 Neb. 667-685, 103 N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267.

No express words are necessary to create a trust. Estate of Haines, 150 Cal. 640, 89 Pac. 606; Doe ex dem. Patton v. Dillon, 1 Marvel (Del.) 232, 40 Atl. 1106; Heywood's Estate, 148 Cal. 184, 82 Pac. 755; Ryder v. Lyon, 85 Conn. 245, 82 Atl. 573; Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. 1164, 32 L. Ed. 138; Cockrill v. Armstrong, 31 Ark. 580; McRee's Adm'rs v. Means, 34 Ala. 349; Plaut v. Plaut, 80 Conn. 673, 70 Atl. 52.

²³ Murphy v. Caslin, 113 Mo. 112, 20 S. W. 786, 35 Am. St. Rep. 699; Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357; Kauffman v. Gries, 141 Cal. 295, 74 Pac. 846; Marti's Estate, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; Hughes v. Fitzgerald, 78 Conn. 4, 60 Atl. 694; Corby v. Corby, 85 Mo. 371; Hartman v. Armstrong, 59 Kan. 696, 54 Pac. 1046; Bryan v. Milby, 6 Del. Ch. 208, 24 Atl. 333, 13 L. R. A. 563; Hunt v. Hunt, 11 Nev. 442; Weller v. Weller, 22 Tex. Civ. App. 247, 54 S. W. 652.

²⁴ Small v. Field, 102 Mo. 125, 14 S. W. 815; Toland v. Toland, 123 Cal. 140, 55 Pac. 681; McDuffie v. Montgomery (C. C.) 128 Fed. 105;

A precatory trust is not to be inferred from expressions of confidence or desire on the part of the testator contained in the will regarding the use to be made of the property devised or bequeathed, unless it fairly appears from the will that the testator contemplated and intended to create such a trust; and especially no such trust will be implied when it clearly appears from the will that the testator intended to give the devisee full discretion in the use of the property.

A trust is not readily inferred from directions or request to a wife to provide for children,²⁵ but may be from provisions for support and maintenance of other persons.²⁶

The tenor of modern decisions is unfavorable to the conversion of a devisee or legatee into a trustee by reason of precatory or commendatory words, and it is well settled that such expressions must be essentially imperative in their character to create a trust.²⁷

Russell v. U. S. Trust Co., 136 Fed. 758, 69 C. C. A. 410; Pierce v. Phelps, 75 Conn. 83, 52 Atl. 612; Seamonds v. Hodge, 36 W. Va. 304, 15 S. E. 156, 32 Am. St. Rep. 854; McCroan v. Pope, 17 Ala. 612.

²⁵ Glass' Estate, Myr. Prob. (Cal.) 213; Molk's Estate, Myr. Prob. (Cal.) 212.

Compare Cowman v. Harrison, 10 Hare, 234; Hora v. Hora, 33 Beav. 88; Johnson v. Johnson, 215 Mass. 276, 102 N. E. 465.

²⁶ Bloom v. Strauss, 73 Ark. 56, 84 S. W. 511.

²⁷ Bristol v. Austin, 40 Conn. 438; Hayes v. Hayes, 242 Mo. 155, 145 S. W. 1155.

Words held sufficient to create precatory trust. Estate of Buhrmeister, 1 Cal. App. 80, 81 Pac. 752; Dexter v. Evans, 63 Conn. 58, 27

§ 174. Executors as trustees—Modern distinction between the two functions

In the construction of wills some interesting questions arise when, and how far, an executor is clothed with the powers of a trustee. In a broad and general sense an executor may always be regarded as a trustee. His duties as executor are of a fiduciary character, and courts of equity early exercised a superintending control over him—

in the administration of assets, by compelling him in the due execution of his trust, to apply the property to the payment of the debts and legacies, and the surplus according to the will.²⁸

But in this country, as probate courts created by statute are given ample jurisdiction to issue letters of authority to executors, compel them to account, and generally to superintend their acts, the courts of equity have either lost a portion of their jurisdiction by the exclusive jurisdiction vested in the probate courts, or have discouraged an appeal to its exercise when only the ordinary duties of an ex-

Atl. 308, 38 Am. St. Rep. 336; *Busby v. Lynn*, 37 Tex. 146; *McMurry v. Stanley*, 69 Tex. 227, 6 S. W. 412; *Pratt v. Miller*, 23 Neb. 496, 37 N. W. 263.

Words held insufficient to create trust. *Ellis v. Ellis' Adm'r*, 15 Ala. 296, 50 Am. Dec. 132; *Whitcomb's Estate*, 86 Cal. 270, 24 Pac. 1028; *Floyd v. Smith*, 59 Fla. 485, 51 South. 537, 37 L. R. A. (N. S.) 651, 138 Am. St. Rep. 133, 21 Ann. Cas. 318; *Spears v. Ligon*, 59 Tex. 233.

²⁸ *Shoemaker v. Brown*, 10 Kan. 390; *Klemp v. Winter*, 23 Kan. 703; *Carter v. Christie*, 57 Kan. 496, 46 Pac. 964.

ecutor are involved.²⁹ Thus, while the duties of an executor are in the nature of a trust, they are regulated by law, the time and manner of their performance prescribed, and they are placed under the supervision of the probate court.

§ 175. Powers as trustee expressed or implied in the will

But in many cases the testator imposes upon the executor duties of a trust character in addition to his ordinary functions as executor. The executor then becomes trustee as well as executor.³⁰

²⁹ *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86.

The chancery power of the federal circuit courts extends to the supervision of executors who are acting as trustees under a will. This jurisdiction does not extend to the appointment of administrators, the confirmation of executors, nor will it be exercised when the state courts of concurrent jurisdiction have taken possession of the subject matter of the controversy. *Ball v. Tompkins* (C. C.) 41 Fed. 486.

³⁰ *McLaughlin v. Penney*, 65 Kan. 523, 70 Pac. 341; *Noecker v. Noecker*, 66 Kan. 347, 71 Pac. 815; *Mead v. Jennings*, 46 Mo. 91; *Allen v. Claybrook*, 58 Mo. 124; *Cross v. Hoch*, 149 Mo. 325, 50 S. W. 786; *Peugnet v. Berthold*, 183 Mo. 61, 81 S. W. 874; *Gaston v. Hayden*, 98 Mo. App. 683, 73 S. W. 938; *Hall v. Howdeshell*, 33 Mo. 475; *Webb v. Hayden*, 166 Mo. 39, 65 S. W. 760; *St. Lukes Church v. Witters* (C. C.) 54 Fed. 56; *Ames v. Holderbain* (C. C.) 44 Fed. 224; *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825; *Crenshaw v. Crenshaw*, 127 Ala. 208, 28 South. 396; *Mastin v. Barnard*, 33 Ga. 520; *Toombs v. Spratlin*, 127 Ga. 766, 57 S. E. 59; *Wilson v. Snow*, 35 App. D. C. 562; *Matthews v. Daniell*, 27 Tex. Civ. App. 181, 65 S. W. 890; *Lannis v. Fletcher*, 100 Tex. 550, 101 S. W. 1076; *Tuckerman v. Currier*, 54 Colo. 25, 129 Pac. 210.

An executor, as a trustee, cannot hold the legal title to land devised for the use of the beneficiary unless the testator has by his will expressly or impliedly created in him a trust estate other and

The executor may be expressly designated as the trustee of a testamentary trust.³¹

If a will directs something to be done which is the proper subject of a trust, but appoints no one to perform it, the executor may then be held to be a trustee, by implication, to carry out the terms of the trust.³² In all such cases the functions of the executor should be kept distinct as far as possible from his duties as trustee.

Some courts have held that the trust powers attach to the office of executor and not to the individuals named.³³ In any case the fact that the same persons

different from that of executor. *In re Estate of Buerstetta*, 83 Neb. 287, 119 N. W. 469.

³¹ *Potter v. Couch*, 141 U. S. 296, 11 Sup. Ct. 1005, 35 L. Ed. 721; *Chase v. Cartright*, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207; *Judd v. Bushnell*, 7 Conn. 211; *Willingham v. Bentley*, 20 Ga. 783; *Appel v. Childress*, 53 Tex. Civ. App. 607, 116 S. W. 129.

³² Where a will expressly or by necessary implication creates certain trusts and imposes upon the executor duties which are usually performed by a trustee, he will take such interest or title in the property as is requisite, although the will does not specifically designate him as trustee nor expressly devise the property to him in trust. *Patten v. Herring*, 9 Tex. Civ. App. 640, 29 S. W. 388; *Marshall v. Meyers*, 96 Mo. App. 648, 70 S. W. 927; *Cockrill v. Armstrong*, 31 Ark. 580; *Abercrombies' Ex'r v. Abercrombies' Heirs*, 27 Ala. 489; *Delaney's Estate*, 49 Cal. 76; *Killgore v. Cranmer*, 48 Colo. 226, 109 Pac. 950; *Shepard v. Shepard*, 57 Conn. 30, 17 Atl. 173; *Pinney v. Newton*, 66 Conn. 141, 33 Atl. 591; *Angus v. Noble*, 73 Conn. 56, 46 Atl. 278; *Ryder v. Lyon*, 85 Conn. 245, 82 Atl. 573; *Marfield v. McMurphy*, 25 App. D. C. 342; *Mitchell v. Thomson*, 18 D. C. 130; *Wilson v. Snow*, 228 U. S. 217, 33 Sup. Ct. 487, 57 L. Ed. 807.

What not sufficient to constitute executors trustees. *McCloud v. Hewlett*, 135 Cal. 361, 67 Pac. 333.

³³ *Pforr's Estate*, 144 Cal. 121, 77 Pac. 825; *Shey's Appeal*, 73 Conn. 122, 46 Atl. 832.

See a careful consideration of the difference between a personal

who are named as executors are also named as trustees does not merge the trusteeship in the executorship.³⁴ The proper course in such a case is for the executor to first discharge his duties as executor by winding up the estate and properly distributing it, paying over to himself as trustee such portion of the property as is clothed with the trust; and thereafter proceed to manage the latter in his capacity as trustee.³⁵

Trusts conferred in a will on several executors named may be discharged by those who qualify, according to the statute 21 Hen. VIII, c. 4.³⁶ Until final distribution of the estate he is still executor and under the control of the probate court, although he may also be as to his special trust powers subject to the jurisdiction of equity.³⁷ After

trust and an official duty. *Donaldson v. Allen*, 182 Mo. 634, 81 S. W. 1151; *Taylor v. Benham*, 5 How. 233, 12 L. Ed. 130.

³⁴ *West v. Bailey*, 196 Mo. 517, 94 S. W. 273; *Schley v. Brown*, 70 Ga. 64.

³⁵ *Scholl v. Olmstead*, 84 Ga. 693, 11 S. E. 541; *Peavy v. Dure*, 131 Ga. 104, 62 S. E. 47; *Judson v. Bennett*, 233 Mo. 607, 136 S. W. 681; *Ryder v. Lyon*, 85 Conn. 245, 82 Atl. 573.

When a sale is directed by the testator at a time beyond the settlement of the estate, the court must appoint a trustee to make the sale. *Chandler v. Delaplaine*, 4 Del. Ch. 503.

³⁶ *Blanton v. Mayes*, 58 Tex. 422.

³⁷ *Colt v. Colt*, 111 U. S. 566, 4 Sup. Ct. 553, 28 L. Ed. 520; *State v. Hunter*, 73 Conn. 435, 47 Atl. 665; *Woodruff v. Williams*, 35 Colo. 28, 85 Pac. 90, 5 L. R. A. (N. S.) 986; *Parsons v. Lyman*, 32 Conn. 566, Fed. Cas. No. 10,780; *Green v. Anderson*, 38 Ga. 655; *Bullard v. Farrar*, 33 Ga. 620; *Park v. Fogarty*, 134 Ga. 861, 68 S. E. 699; *Moore's Ex'r v. Moore's Dis.*, 18 Ala. 242; *Travis v. Morrison*, 28 Ala. 494; *Nagle v. Von Rosenberg*, 55 Tex. Civ. App. 354, 119 S. W. 706.

final distribution of the estate and segregation of the trust fund he is accountable to equity as other trustees.³⁸

§ 176. Administration of testamentary trusts

The administration of testamentary trusts is governed by the general principles of equity.³⁹ The main thing is that the trust fund should be segre-

³⁸ *Marfield v. McMurdy*, 25 App. D. C. 342; *McClelland v. McClelland*, 46 Tex. Civ. App. 26, 101 S. W. 1171.

Where the executors who are also trustees set aside by their own act, without the concurrence of the court or the beneficiaries certain property in satisfaction of the trust fund, which property afterward proves insufficient they cannot set up their unauthorized act as relieving the general estate from liability for the trust fund. *Sherman v. Jerome*, 120 U. S. 319, 7 Sup. Ct. 577, 30 L. Ed. 680.

³⁹ *Estate of Heywood*, 148 Cal. 184, 82 Pac. 755; *Bell v. Towner*, 55 Conn. 364, 11 Atl. 185; *McCaffrey v. Little*, 20 App. D. C. 116-124; *Jamison v. McWhorter*, 7 Houst. (Del.) 242; *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; *Williamson v. Grider*, 97 Ark. 588, 135 S. W. 361; *Ingram v. Fraley*, 29 Ga. 553; *Berry v. Stigall*, 125 Mo. App. 264, 102 S. W. 585; *Harrison v. Watkins*, 127 Ga. 314, 56 S. E. 437; *Freeman v. Brown*, 115 Ga. 23, 41 S. E. 385.

Courts of equity have inherent power to construe and enforce testamentary trusts. *Knox v. Knox*, 87 Kan. 381, 124 Pac. 409; *McGehee v. Polk*, 24 Ga. 406; *Partee v. Thomas* (C. C.) 11 Fed. 769.

A trust shall never fail for want of a trustee. *White v. McKeon*, 92 Ga. 343, 17 S. E. 283.

Court of equity has inherent power to appoint a trustee. *O'Brien v. Battle*, 98 Ga. 766, 25 S. E. 780; *Rothenberger v. Garrett*, 224 Mo. 191, 123 S. W. 574. Or to remove a trustee and appoint another. *Holman v. Renaud*, 141 Mo. App. 399, 125 S. W. 843; *Cooper v. Carter*, 145 Mo. App. 387, 129 S. W. 224. Even though the trust involves a discretion. *Prince v. Barrow*, 120 Ga. 810, 48 S. E. 412.

Powers of trustees. *Maynard v. Greer*, 129 Ga. 709, 59 S. E. 798; *Heard v. Sill*, 26 Ga. 302; *Pope v. Tift*, 69 Ga. 741; *Albert v. Sanford*, 201 Mo. 117-130, 99 S. W. 1068.

gated as soon as possible from the general estate.⁴⁰ The trust must of course be a lawful one, particularly as relates to the statutes of the state governing testamentary trusts.⁴¹

If a valid trust can be separated from a void trust in the same will, the valid trust will stand.⁴²

Where the duties imposed require the trustees to take the title they will do so without express devise,⁴³ and the quantity of estate taken will be limited to the purposes of the trust.⁴⁴ So the interest of the beneficiary is limited by the purposes of the trust.⁴⁵

⁴⁰ *Mackay v. Mackay*, 107 Cal. 303, 40 Pac. 558.

⁴¹ Under the statutes of California it was decided that a trust "to convey" was illegal and void. *Fair's Estate*, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. As a result of course, trouble followed this effort by the court to twist the law to effect a particular result in a particular case. *Estate of Heywood*, 148 Cal. 184, 82 Pac. 755; *Estate of Lux*, 149 Cal. 200, 85 Pac. 147; *Estate of Heberle*, 153 Cal. 275, 95 Pac. 41; *Estate of Peabody*, 154 Cal. 173, 97 Pac. 184. Until the whole rule of the earlier decision was neatly sidestepped in the later case of *Estate of Spreckels*, 162 Cal. 559, 123 Pac. 371.

⁴² *Chilcott v. Hart*, 23 Colo. 40, 45 Pac. 391, 35 L. R. A. 41; *Pi-choir's Estate*, 139 Cal. 682, 73 Pac. 606; *In re Walkerly*, 108 Cal. 627, 41 Pac. 779, 49 Am. St. Rep. 97; *Andrews v. Rice*, 53 Conn. 566, 5 Atl. 823; *Coltman v. Moore*, 1 MacArthur (D. C.) 197.

⁴³ *Reith's Estate*, 144 Cal. 314, 77 Pac. 942; *Bell County v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268.

⁴⁴ *Canfield v. Canfield*, 118 Fed. 1, 55 C. C. A. 169; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *In re L'Hommedieu* (D. C.) 138 Fed. 606; *Powell v. Glenn*, 21 Ala. 458; *Smith v. Dunwoody*, 19 Ga. 237; *Harmon v. Smith* (C. C.) 38 Fed. 482.

⁴⁵ *Gray v. Corbit*, 4 Del. Chan. 135; *Sparks v. De La Guerra*, 18 Cal. 676; *Hurst v. Weaver*, 75 Kan. 758, 90 Pac. 297; *Estate of Lux*, 149 Cal. 200, 85 Pac. 147.

The intervention of trustees does not render the estate or interest

§ 177. Testamentary trusts may be active or passive

Testamentary trusts, like other trusts, are affected by the Statute of Uses, and the distinction between active trusts and passive trusts.⁴⁶ Though the will vests the legal title in a trustee, if no control over the land is given to him and no duties to perform, the trust is a dry one and is executed by the Statute of Uses.⁴⁷

A person *sui juris* needs no trustee.⁴⁸ A trust for persons who at the time of the execution of the will

vested in the beneficiaries inalienable. In general, the cestui que trust or beneficiary in a trust estate may convey his interest at pleasure as if he were the legal owner. *Nimmo v. Davis*, 7 Tex. 26-29.

⁴⁶ Difference between active and passive trust. *Jones v. Jones*, 223 Mo. 424, 123 S. W. 29, 25 L. R. A. (N. S.) 424.

⁴⁷ *Jones v. Jones*, 223 Mo. 424, 123 S. W. 29, 25 L. R. A. (N. S.) 424; *Ringrose v. Gleadall*, 17 Cal. App. 664, 121 Pac. 407.

A devise in trust for one who is of full age and competent and not a spendthrift and where there is no restraint upon his alienation, and no duties for the trustee to perform is a dry trust, and the court may terminate it. *Hill v. Hill*, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198.

Such a trust would be executed by the statute of uses but that statute is not part of the law of Nebraska. *Hill v. Hill*, 90 Neb. 48, 132 N. W. 738, 38 L. R. A. (N. S.) 198.

⁴⁸ *Am. Mtg. Co. v. Hill*, 92 Ga. 297-306, 18 S. E. 425; *Harrison v. Baldwin*, 92 Ga. 329-331, 18 S. E. 402; *Thompson v. Sanders*, 118 Ga. 928, 45 S. E. 715; *Collins v. Carr*, 118 Ga. 205, 44 S. E. 1000.

Since Married Woman's Statute a trust for a married woman becomes executed and vests in her the legal estate. *Woodward v. Stubbs*, 102 Ga. 187, 29 S. E. 119; *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 866; *Brantley v. Porter*, 111 Ga. 886, 36 S. E. 970; *Mathews v. Paradise*, 74 Ga. 523.

Contra: *Lanius v. Fletcher*, 100 Tex. 550, 101 S. W. 1076; *Ellis v. Birkhead*, 30 Tex. Civ. App. 529, 71 S. W. 31.

and at the time of the death of the testatrix were sui juris and not spendthrifts or otherwise incompetent, and without limitation over, is executed at the death of the testator, and legal title passes to beneficiaries.⁴⁹ If the beneficiaries become sui juris, so that there is no longer need for the executor or other trustee to retain and manage the property, the trust becomes executed.⁵⁰ But otherwise if the beneficiary is incompetent,⁵¹ or the interest of others is involved.⁵²

§ 178. When trust terminates

A trust terminates when the purposes of it are accomplished.⁵³ If there is any uncertainty in the time of termination as intended by the testator it is the duty of the court to fix such time as will best aid in carrying into effect the purposes for which the trust was established.⁵⁴ When a trust is created for the benefit of a life tenant, or for the support, education

⁴⁹ *Lester v. Stephens*, 113 Ga. 495, 39 S. E. 109.

⁵⁰ *Turner v. Kirkpatrick*, 77 Ga. 794, 3 S. E. 246; *Gibson v. Maxwell*, 85 Ga. 235, 11 S. E. 615; *McClelland v. Rose*, 208 Fed. 503, 125 C. C. A. 505 (Tex.).

⁵¹ *Gray v. Obear*, 54 Ga. 231; *Gray v. Obear*, 59 Ga. 675.

⁵² *Middlebrooks v. Ferguson*, 126 Ga. 232, 55 S. E. 34.

⁵³ *Thompson v. Marshall*, 73 Conn. 89, 46 Atl. 825; *Vogt v. Vogt*, 26 App. D. C. 46; *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 866; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524; *Hill v. Hill*, 90 Neb. 43, 132 N. W. 738, 38 L. R. A. (N. S.) 198; *Ringrose v. Gleadall*, 17 Cal. App. 664, 121 Pac. 407.

A person cannot be trustee for himself so as to require him to keep his own interest in estate intact, though the will direct it to be kept together. *Harrison v. Baldwin*, 92 Ga. 329-331, 18 S. E. 402.

⁵⁴ *Frost v. McCaulley*, 7 Del. Chan. 162, 44 Atl. 779.

or other personal benefit of a person, the death of the beneficiary will terminate the trust, unless there be express language in the will requiring its continuance, and vest the absolute property in the remaindermen, discharged of the trust.⁵⁵ The trust cannot be terminated or affected by any act, default or estoppel of the life tenant alone or of the trustee, or of the life tenant in conjunction with the trustee or any heir apparent, or contingent remainderman.⁵⁶ But it is possible for the life tenant of an equitable estate *if sui juris*, to sell out and release to the vested remainderman and thus terminate the trust.⁵⁷ This results from the doctrine of merger. But if there be any contingent interests, or interests of a person not *sui juris*, or if a merger would defeat the intention of the testator, it cannot occur.⁵⁸

⁵⁵ *Hutchinson's Appeal*, 34 Conn. 303; *Cowles v. Cowles*, 56 Conn. 240-248, 13 Atl. 414; *Thomas v. Castle*, 76 Conn. 447, 56 Atl. 854; *Bradley v. Young*, 2 MacArthur (D. C.) 229; *Jordan v. Thornton*, 7 Ga. 517; *Newman v. Dotson*, 57 Tex. 117; *Bull v. Walker*, 71 Ga. 195; *Ford v. Cook*, 73 Ga. 215; *Brantley v. Porter*, 111 Ga. 886, 36 S. E. 970; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *McDonald v. McCall*, 91 Ga. 304, 18 S. E. 157; *Baxter v. Wolfe*, 93 Ga. 334, 20 S. E. 325; *Henderson v. Williams*, 97 Ga. 709, 25 S. E. 395; *Fleming v. Hughes*, 99 Ga. 444, 27 S. E. 791.

⁵⁶ *Chandler v. Pomeroy*, 96 Fed. 156, 37 C. C. A. 430; *Moredock v. Moredock* (C. C.) 179 Fed. 163; *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094; *Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415.

⁵⁷ *Drennen v. Heard* (D. C.) 198 Fed. 414.

⁵⁸ *Estate of Washburn*, 11 Cal. App. 735, 106 Pac. 415.

§ 179. Trusts for accumulation

Trusts for accumulation are not favored by the law, even when they do not transcend the rule against perpetuities. There is no just reason for permitting a man arbitrarily to accumulate property after his death. Such a course not only casts a moral and economic blight upon his descendants, but is a distinct injury to the community. The celebrated case of *Thelusson v. Woodford*, 4 Vesey, 227, was of this character, of which Chancellor Kent has said:

This is the most extraordinary instance upon record of calculating and impelling pride and vanity in a testator, and disregarding the ease and comfort of his immediate descendants, for the miserable satisfaction of enjoying in anticipation the wealth and aggrandizement of a distant posterity. Such an iron-hearted scheme of settlement, by withdrawing property for so long a period from all the uses and purposes of social life, was intolerable. It gave occasion to the Statute of 39 and 40 Geo. III, c. 98, prohibiting thereafter any person by deed or will from settling or devising real or personal property, for the purpose of accumulation by means of rents or profits for a longer period than the life of the settler, or twenty-one years after his death, or during the minority of any person or persons, living at his decease, who under the deed or will directing the accumulation would, if then of full age, be entitled to the rents and profits.⁵⁹

The act referred to, known as Lord Thelusson's Act, has been adopted in New York, and other states.⁶⁰

⁵⁹ 4 Kent's Commentaries, p. 285.

⁶⁰ See an interesting discussion of this act and its spirit. *Thorn v. De Breteuil*, 86 App. Div. 410, 83 N. Y. Supp. 849.

The act is followed by statute in California. *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50.

In the absence of such a statute there seems to be no limitation, except the rule against perpetuities, to such accumulations.⁶¹

CHARITABLE OR PUBLIC TRUSTS

§ 180. Their nature and kinds

Trusts for charities are sometimes called public trusts to distinguish them from private trusts for designated individuals. They differ from the latter in two important particulars:

First: In a private trust the beneficiaries must be designated with reasonable certainty, and be capable of taking a vested equitable title. Public trusts, on the other hand, are for the benefit of an uncertain, unascertained and often fluctuating body of persons, being that portion of the public which from time to time comes within the range of the testator's scheme

⁶¹ *Fitchie v. Brown*, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202, affirming 18 Hawaii, 52.

Trust for accumulation for twenty years and then the income to be divided for twenty years upheld. *Conn. Trust & S. D. Co. v. Hollister*, 74 Conn. 228, 50 Atl. 750.

Trust until beneficiaries reached thirty years of age construed but not attacked. *Holcombe v. Spencer*, 82 Conn. 532, 74 Atl. 904.

Trusts for accumulation for a fixed period, within the rule against perpetuities, and then to be paid to the legatee, held valid under authority of *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, and English chancery rule against restraints or alienation not followed. *King v. Shelton*, 36 App. D. C. 1.

Trust and postponement of legacies until youngest beneficiary was twenty-five years of age sustained. Bill in equity to terminate trust refused. *Shelton v. King*, 229 U. S. 190, 33 Sup. Ct. 686, 57 L. Ed. 1086; *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393.

of bounty.⁶² It is not contemplated that the persons to be directly benefited by the charity shall have any right to control or enforce the trust. That right resides in the public in its organized capacity, i. e., the state.

Second: The second important distinction between a public and a private trust is that a charity is not affected by the rule against perpetuities. It is, in its very nature, perpetual.⁶³ After a charitable trust is once completely created the heirs of the donor have no further interest in the property.⁶⁴

⁶² *Tincher v. Arnold*, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917; *McDonald v. Shaw*, 81 Ark. 235, 98 S. W. 952; *State v. Griffith*, 2 Del. Chan. 393; *Ould v. Wash. Hospital*, 1 MacArthur (D. C.) 541, 29 Am. Rep. 605; *Holman v. Renaud*, 141 Mo. App. 399, 125 S. W. 843; *Silcox v. Harper*, 32 Ga. 639.

⁶³ *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136; *Estate of Hinckley*, 58 Cal. 457; *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *Pierce v. Rhelms*, 75 Conn. 83, 52 Atl. 612; *State v. Griffith*, 2 Del. Chan. 392; *Ould v. Wash. Hospital*, 1 MacArthur (D. C.) 541, 29 Am. Rep. 605; *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401; *White v. Keller*, 68 Fed. 796, 15 C. C. A. 683; *Tincher v. Arnold*, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917; *Inglehart v. Inglehart*, 204 U. S. 478, 27 Sup. Ct. 329, 51 L. Ed. 575; *Stewart v. Coshov*, 238 Mo. 662, 142 S. W. 283; *Paschal v. Acklin*, 27 Tex. 173.

⁶⁴ *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Women's Christian Ass'n v. Kansas City*, 147 Mo. 103, 48 S. W. 960; *Goode v. McPherson*, 51 Mo. 126; *White v. Keller*, 68 Fed. 796, 15 C. C. A. 683; *Sickles v. New Orleans*, 80 Fed. 868, 26 C. C. A. 204; *Sherman v. Am. Cong. Ass'n (C. C.)* 98 Fed. 495; *Taylor v. Columbian University*, 35 App. D. C. 69; *Lewis v. Gaillard*, 61 Fla. 819, 56 South. 281; *Cumming v. Trustees*, 64 Ga. 105.

A public charity is a public benefit and the attorney general, upon request of the governor, may represent the public in giving force and effect to such charity when its interests are not otherwise adequate-

The purposes which may properly be considered charitable are divided by some writers into four classes:

First: Gifts for strictly eleemosynary purposes, such as "to the poor," "for a hospital," "for the relief of poor emigrants," "for a home for the aged," etc.⁶⁵

Second: Gifts for educational purposes, such as colleges, libraries, literary institutes, etc.⁶⁶

Third: Gifts for religious purposes, such as for churches, bible societies, missionaries, etc.⁶⁷

Fourth: Gifts for erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

§ 181. Statute 43 Elizabeth

During the reign of Queen Elizabeth, an act of Parliament was passed known as the Statute of Charitable Uses, 43 Elizabeth, c. 4, which was designed to correct certain abuses in the management of public charities in England, by vesting their control more

ly represented. *In re Estate of Creighton*, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128.

⁶⁵ *McDonogh v. Murdoch*, 15 How. 367, 14 L. Ed. 732; *Weeks v. Mansfield*, 84 Conn. 544, 80 Atl. 784; *In re Estate of Creighton*, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128.

⁶⁶ *Taylor v. Columbian University*, 226 U. S. 126, 33 Sup. Ct. 73, 57 L. Ed. 152 (*Columbian University v. Taylor*, 25 App. D. C. 124, affirmed); *Washburn College v. O'Hara*, 75 Kan. 700, 90 Pac. 234; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *Smith v. Gardiner*, 36 App. D. C. 485.

⁶⁷ *Mack's Appeal*, 71 Conn. 122, 41 Atl. 242; *In re Estate of Douglass*, 94 Neb. 280, 143 N. W. 299.

directly in the crown. That statute has since been followed in England with great strictness, as its scope was very sweeping, it contained an express enumeration of purposes properly considered charitable, and its remedies were peculiarly adapted to the English form of government. Much confusion was occasioned at an early day in this country by reason of the fact that the English decisions under that statute were too hastily adopted by the supreme court of the United States. The confusion arose from the fact that in some of the states the Statute 43 Elizabeth had been expressly repealed, while in other states it had been held not to be part of the common law because local to the kingdom of Great Britain. If it were held that the courts derived their jurisdiction over charitable trusts only from the Statute 43 Elizabeth, then in the absence of that statute, no power of control existed, and in some cases the charities were without legal foundation. Afterward in the great Girard Will case,⁶⁸ the question was more exhaustively examined by Justice Story, and it was decided that the jurisdiction of courts of equity over charities, did not arise from the Statute 43 Elizabeth, but had existed long prior to that statute, and was inherent in courts of equity in this country. This is now the settled rule.⁶⁹

⁶⁸ *Vidal v. Girard*, 2 How. 128, 11 L. Ed. 205.

⁶⁹ *Estate of Hinckley*, 58 Cal. 457; *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *State v. Griffith*, 2 Del. Chan. 392; *Ould v. Wash. Hospital*, 1 MacArthur (D. C.) 541, 29 Am. Rep. 605; *Chambers v. City of St. Louis*, 29 Mo. 543;

§ 182. Discretion in trustee as to objects

In creating a charity the testator sets apart a portion of his property and designates a purpose properly within the class known as charitable. This is ordinarily sufficient. It is of the very nature of a charity that the beneficiaries are uncertain, and mere obscurity or indefiniteness will not necessarily defeat a gift to charitable uses.⁷⁰ Thus it has been held that if the purpose is clearly charitable and a definite trustee is named, he may be given discretion as to the selection of the objects.⁷¹

Howe v. Wilson, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226; *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Sherman v. Am. Cong. Ass'n* (C. C.) 98 Fed. 495; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268; *In re Estate of Nilson*, 81 Neb. 809, 116 N. W. 971.

Statute 43 Eliz. c. 4, was adopted by Statutes of Arkansas. *Biscoe v. Thweatt*, 74 Ark. 545, 86 S. W. 432, 4 Ann. Cas. 1136.

Statute 43 Eliz. c. 4, was never in force in District of Columbia. *Ould v. Wash. Hospital*, 95 U. S. 303, 24 L. Ed. 450. Nor in Nebraska. *St. James O. A. v. Shelby*, 60 Neb. 797, 84 N. W. 273, 83 Am. St. Rep. 553.

⁷⁰ *Chambers v. City of St. Louis*, 29 Mo. 589; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617; *Banner v. Rolf*, 43 Tex. Civ. App. 88, 94 S. W. 1125; *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203, 79 S. W. 831; *In re Estate of Nilson*, 81 Neb. 809, 116 N. W. 971.

Valid charitable trusts. *King v. Grant*, 55 Conn. 166, 10 Atl. 505; *Bronson v. Strouse*, 57 Conn. 147, 17 Atl. 699; *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; *Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537; *Strong's Appeal*, 68 Conn. 527, 37 Atl. 395; *Eliot's Appeal*, 74 Conn. 586, 51 Atl. 558; *Doughten v. Vandever*, 5 Del. Chan. 51.

⁷¹ *Loring v. Marsh*, 6 Wall. 337, 18 L. Ed. 802; *Sickles v. New Orleans*, 80 Fed. 868, 26 C. C. A. 204; *Woodroof v. Hundley*, 147 Ala. 287, 39 South. 907; *Fay v. Howe*, 136 Cal. 599, 69 Pac. 423; *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *Beardsley v. Selectman*, 53 Conn. 489, 3 Atl. 557, 55 Am. Rep.

The rule in Missouri is in accordance with sound principles and with the decisions of the English courts but differs from the rule in some of the other states, notably New York state, where the great trust created under Tilden's will was defeated on the ground that a discretionary power given to trustees to select the objects of the trust rendered the whole trust void.⁷²

§ 183. Designation of institution or association

The testator may provide in his will alternative plans or a succession of institutions, and if either plan is capable of enforcement, or either institution in turn is capable of taking, the trust will take effect.⁷³

A charitable gift will not be defeated by a mistake or omission in the name of the society or association to whom it is given if the institution intended can

152; *Bronson v. Strouse*, 57 Conn. 147, 17 Atl. 699; *Hayden v. Conn. Hospital*, 64 Conn. 320, 30 Atl. 50; *Mack's Appeal*, 71 Conn. 122, 41 Atl. 242; *Columbian University v. Taylor*, 25 App. D. C. 124; *Howe v. Wilson*, 91 Mo. 45, 3 S. W. 390, 60 Am. Rep. 226; *Powell v. Hatch*, 100 Mo. 592, 14 S. W. 49; *Sappington v. School Fund Trustees*, 123 Mo. 32, 27 S. W. 356 (in spite of dicta to the contrary in *Schmucker v. Reel*, 61 Mo. 592); *Franklin v. Boone*, 39 Tex. Civ. App. 597, 88 S. W. 262; *St. James O. A. v. Shelby*, 60 Neb. 797, 84 N. W. 273, 83 Am. St. Rep. 553; *Miller v. Teachout*, 24 Ohio St. 525; *Grimes v. Harmon*, 35 Ind. 199, 9 Am. Rep. 690.

⁷² *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 31 Am. Law Reg. 75, 14 L. R. A. 33, 27 Am. St. Rep. 487.

⁷³ *Tappan's Appeal*, 52 Conn. 412; *Taylor v. Columbian University*, 226 U. S. 126, 33 Sup. Ct. 73, 57 L. Ed. 152 (*Columbian University v. Taylor*, 25 App. D. C. 124, affirmed).

be identified.⁷⁴ So, a charitable trust has been upheld in many cases though given to an unincorporated body, or a corporation that is not in existence at the donor's death.⁷⁵

The federal government or a state may be made trustee of a charitable trust, but it seems that the acceptance of the state is necessary.⁷⁶ A municipal corporation may hold property in trust for charitable uses, and be compelled in equity to administer the trust.⁷⁷

⁷⁴ *Sundry bequests to charitable societies by wrong names held to go to the societies that were shown to have been intended by the testator.* *Am. Bible Soc. v. Wetmore*, 17 Conn. 186; *Jacobs v. Bradley*, 36 Conn. 369; *Dunham v. Averill*, 45 Conn. 86, 29 Am. Rep. 642; *King v. Grant*, 55 Conn. 170, 10 Atl. 505; *Goodrich's Appeal*, 57 Conn. 282, 18 Atl. 49; *Bristol v. Ontario Orphan Asylum*, 60 Conn. 476, 22 Atl. 848; *Conklin v. Davis*, 63 Conn. 385, 28 Atl. 537; *Crosgrove v. Crosgrove*, 69 Conn. 416, 38 Atl. 219; *Ayers v. Weed*, 16 Conn. 299; *Brewster v. McCall's Devisees*, 15 Conn. 293; *Lockwood v. Weed*, 2 Conn. 291; *Beardsley v. Am. Home Missionary Soc.*, 45 Conn. 329; *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22.

⁷⁵ *Ould v. Wash. Hospital*, 95 U. S. 303, 24 L. Ed. 450; *Brigham v. Hospital*, 134 Fed. 513, 67 C. C. A. 393; *White v. Howard*, 38 Conn. 363; *Coit v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29; *Russell v. Allen*, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397; *Lilly v. Tobbein*, 103 Mo. 486, 15 S. W. 618, 23 Am. St. Rep. 887; *Schmidt v. Hess*, 60 Mo. 591.

Charitable trust must be within the purposes of the society or it cannot take. *Am. Colonization Society v. Gartrell*, 23 Ga. 448.

⁷⁶ *State v. Blake*, 69 Conn. 64, 36 Atl. 1019; *Appeal of Yale College*, 67 Conn. 237, 34 Atl. 1036.

⁷⁷ *Chambers v. City of St. Louis*, 29 Mo. 543; *Handley v. Palmer* (C. C.) 91 Fed. 948; *Clayton v. Hallett*, 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117; *Bell Co. v. Alexander*, 22 Tex. 350, 73 Am. Dec. 268.

City council held to have no authority of law to accept or administer charitable trust, following *Vidal v. Girard's Ex'r*, 2 How. 127, 11 L. Ed. 205; *City Council v. Walton*, 77 Ga. 517, 1 S. E. 214.

§ 184. Doctrine of cy pres

A strong aid to the courts of equity in upholding and carrying into execution a charitable trust is the doctrine of cy pres. By this doctrine if the particular purpose pointed out by the testator is clearly charitable in its nature, but by reason of change of circumstances the exact plan cannot be literally followed, the courts have power to adjust the charity to the altered circumstances, and execute the trust cy pres, that is, *as near as possible* to the testator's purpose.

If a charity cannot be carried out in the exact mode indicated by the donor, or if that mode should become by subsequent circumstances impossible, the general object will not be defeated, if any other way can be obtained.⁷⁸

Under this power courts of equity may direct a sale of property devoted to a charitable trust, or modify the directions of the founder.⁷⁹

⁷⁸ *Academy v. Clemens*, 50 Mo. 167; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617; *Tincher v. Arnold*, 147 Fed. 665, 77 C. C. A. 649, 7 L. R. A. (N. S.) 471, 8 Ann. Cas. 917; *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. 846, 38 Am. St. Rep. 346; *Lewis v. Gaillard*, 61 Fla. 819, 56 South. 281; *Kelley v. Welborn*, 110 Ga. 540-543, 35 S. E. 636; *Ford v. Thomas*, 111 Ga. 493, 36 S. E. 841.

Distinction made between cy pres as a prerogative and as a judicial power. As far as it is a judicial power it devolved upon the courts of this country. *Estate of Hinckley*, 58 Cal. 457-512; *St. James O. A. v. Shelby*, 60 Neb. 797, 84 N. W. 273, 83 Am. St. Rep. 553; *Estate of Nilson*, 81 Neb. 809, 116 N. W. 971.

Cy pres doctrine not recognized in Alabama. *Carter v. Balfour's Adm'r*, 19 Ala. 814; *Woodroof v. Hundley*, 147 Ala. 287, 39 South. 907. Nor in Delaware. *Doughten v. Vandever*, 5 Del. Chan. 51.

⁷⁹ *Lackland v. Walker*, 151 Mo. 210, 52 S. W. 414; *Women's Christian Ass'n v. Kansas City*, 147 Mo. 103, 48 S. W. 960.

Court may appoint trustee of charity. *City Council v. Walton*, 77

§ 185. Void charitable uses

In the English courts, after the Reformation some charitable gifts, especially those given in furtherance of the Roman religion, were denominated "Superstitious" and were held to be illegal. In this country no charitable gifts can properly be said to be superstitious, and it is held that a bequest for masses is valid.⁸⁰

Bequests for the care of burial lots are not charities, however, but are void as perpetuities.⁸¹

If a charitable gift is void or incapable of enforcement, or is too uncertain to be executed, the property usually reverts to the heir at law or next of kin, or to the residuary devisee.⁸²

Ga. 517, 1 S. E. 214; *Gidley v. Lovenberg*, 35 Tex. Civ. App. 203, 79 S. W. 831.

Legislature has no power to enact that real estate left by valid devise to charity shall be sold and converted into personalty. *Thorp v. Fleming*, 1 Houst. (Del.) 580.

⁸⁰ *Harrison v. Brophy*, 59 Kan. 1, 51 Pac. 883, 40 L. R. A. 721; *Pool's Case*, 18 Ala. 514.

Masses for repose of soul held void. *Horn v. Foley*, 13 App. D. C. 184.

⁸¹ *Johnson v. Holifield*, 79 Ala. 423, 58 Am. Rep. 596; *Holifield v. Robinson*, 79 Ala. 419; *Coit v. Comstock*, 51 Conn. 352, 50 Am. Rep. 29; *Bronson v. Strouse*, 57 Conn. 147, 17 Atl. 699; *Iglehart v. Iglehart*, 26 App. D. C. 209.

⁸² *Horn v. Foley*, 13 App. D. C. 184; *Columbian University v. Taylor*, 25 App. D. C. 124.

Void for uncertainty. *Ingraham v. Sutherland*, 89 Ark. 596, 117 S. W. 748; *Robbins v. County Com'rs*, 50 Colo. 610, 115 Pac. 526; *Hughes v. Daly*, 49 Conn. 34; *Fairfield v. Lawson*, 50 Conn. 501, 47 Am. Rep. 669; *Bristol v. Bristol*, 53 Conn. 242, 5 Atl. 687; *Board of Trustees v. May*, 201 Mo. 360, 99 S. W. 1093; *Beall v. Drane*, 25 Ga. 430; *Booe v. Vinson*, 104 Ark. 439, 149 S. W. 524.

Many states have statutes regulating the amount, character and manner of gifts for religious or charitable purposes.⁸³

⁸³ *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401 (Ga.); *Miller v. Ahrens* (C. C.) 150 Fed. 644 (W. Va.); *Id.* (C. C.) 163 Fed. 870; *West Virginia P. & P. Co. v. Miller*, 176 Fed. 284, 100 C. C. A. 176; *In re Pearsons*, 98 Cal. 603, 33 Pac. 451; *Hewitt's Estate*, 94 Cal. 376, 29 Pac. 775; *Royer's Estate*, 123 Cal. 614, 56 Pac. 461, 44 L. R. A. 364; *McCauley's Estate*, 138 Cal. 546, 71 Pac. 458; *Estate of Russell*, 150 Cal. 604, 89 Pac. 345; *Estate of Peabody*, 154 Cal. 173, 97 Pac. 184; *Am. Tract. Soc. v. Purdy*, 3 Hous. (Del.) 625; *Reynolds v. Bristow*, 37 Ga. 283; *Thomas v. Morrisett*, 76 Ga. 384-405; *Kine v. Becker*, 82 Ga. 563, 9 S. E. 828; *White v. McKeon*, 92 Ga. 343, 17 S. E. 283; *Kelley v. Welborn*, 110 Ga. 540, 35 S. E. 636.

Under the Missouri Constitution of 1865 a trust for a religious denomination was void. *Boyce v. Christian*, 69 Mo. 492; *First Baptist Church v. Robberson*, 71 Mo. 326.

Statutory restrictions or bequests for charity, when of extra-territorial force. *Pottstown Hospital v. N. Y. Life I. & T. Co.* (D. C.) 208 Fed. 196 (N. Y.); *Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752.

CHAPTER XII

ADMINISTRATION

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§ 186. History of Probate Jurisdiction

When an owner of property vacates his title by death, the vacant possession is seized upon by the sovereign and the property distributed to such persons and in such manner as the policy of the state, expressed in its laws, dictates. This is true, except where the state, under such conditions as it chooses to impose, permits the former owner to control the distribution by will.¹ With some historical and local variations, this has come to be the settled principle of the English law. "Administration" is the general term applied to the collection, preservation and distribution of estates of deceased persons. The jurisdiction over this subject is not strictly judicial nor purely administrative in its nature, but is a curious mixture of both, and for that reason has never been of such a character that it could be exercised by the common law courts. The beginnings of probate jurisdiction are very obscure, but bear the unmistakable stamp of a Roman origin. It is supposed that the early Britons imbibed their testamentary law from their Roman conquerors, and that such customs continued among them and survived the Saxon conquest.²

During the first period of the Norman supremacy estates were administered in the county court presided over by the earl and the bishop. When William

¹ 2 Bla. Com. pp. 10, 494.

² Read the interesting discussion of this subject by Justice Bradford in the introduction to first volume of Bradford's Surrogate's Reports, New York.

separated the bishop's court from the county court the former naturally drew to itself the probate jurisdiction, in accordance with the Norman custom in such cases. This embraced the proving of wills of personality, as well as the administration of intestates' effects, and the bishop became a sort of public administrator for his diocese. Moreover, the clergy claimed an interest in the goods of the deceased by reason of gifts to pious uses; gifts which were sometimes expressed in wills, but were afterward assumed in cases of intestacy. In this manner it resulted that the ecclesiastical courts obtained full control of administration, without any provision for distribution, or even for the payment of debts.

Blackstone says this was by special favor of the Crown, and in consequence of granting to the bishops the administration of intestates' effects.³ As a special privilege to the church, the right to administer the effects of intestates was granted to the bishop of the diocese. This clergyman was supposed to look after the king's debts, the rights of the lord of the manor, and give the deceased a Christian burial; and after that what remained of the goods was devoted to pious uses—that is, to the use of the church or the private emolument of the bishop. No remedy was provided whereby private creditors of the deceased could recover their debts and they were consequently deprived of their just dues. As trade grew and civilization

³ 3Bla. Com. p. 95; 2 Bla. Com. 494.

increased this evil became an intolerable one. To correct the abuse that no remedy was provided for creditors,

"It was enacted by the statute of Westminster 2 that the ordinary (bishop) should be bound to pay the debts of the intestate as far as his goods will extend, in the same manner as executors are bound in case the deceased left a will; a use more truly pious than any requiem or mass for his soul." ⁴

By subsequent statutes ⁵ the ordinary was required to appoint as administrator the widow or next of kin of the deceased. Later by various statutes of distribution ⁶ the common law right of reasonable parts was formally abolished and the goods were made distributable among the widow and next of kin as in the statutes provided.

§ 187. Probate jurisdiction of ecclesiastical courts

In exercising this power it was natural that the ecclesiastical courts should proceed according to the course of the civil law (which was in use in such courts) thus accentuating the separation from the common law.

In the fact that probate jurisdiction thus grew up in the ecclesiastical courts, with the help of various statutes, is found the explanation of many of the difficulties and inconsistencies in this branch of the law. The jurisdiction proper was originally confined to

⁴ 2 Bla. Com. 495.

⁵ 31 Edw. III, c. 11; 21 Hen. VIII, c. 5.

⁶ 22 & 23 Car. II, c. 10; 29 Car. II, c. 30; 1 Jac. II, c. 17.

distributing the *goods* of an intestate. His land was not affected thereby, as real property was strongly impressed with the rules of the feudal system. The title to land descended to the heir at law, subject to the control of the courts of common law and equity. As such heir at law was different from the next of kin who were distributees of the personal property, a conflict often arose between the interests of the heir at law and those of the administrator who represented the next of kin. The most minute refinement of rules grew out of this antagonism.

Again, while the ecclesiastical courts had power to take proof of last wills yet their control over the executor was much more limited than over an administrator. An administrator was the creature of the courts and succeeded to the office formerly exercised by the bishop in person; but the executor derived his authority directly from the will. The executor was clothed with the general title to the personal property, and might exercise wide and often discretionary powers, not only over the personal estate but also in regard to the landed property—powers which he derived directly from the will, and which the ecclesiastical courts could never have conferred. He was in a broad sense a trustee, and as such amenable to the courts of equity, by which courts he could be made to account like other trustees. Furthermore, the common law courts had power to enforce the payment of debts by the administrator or executor, and the courts of equity could marshal the assets to prevent injus-

tice and inequalities between creditors and distributees caused by the enforcement of legal demands. The jurisdiction of the ecclesiastical courts was not broad enough to cover these matters. Such is a brief outline of the ecclesiastical jurisdiction in probate as it existed at the time the American probate courts were formed.

§ 188. American courts of probate

In the American states, in the absence of ecclesiastical courts, it early became necessary to erect statutory courts to which could be confided probate jurisdiction. Various names are given to them—probate courts, surrogate courts, orphans' courts, etc.; and in some of the newer states the jurisdiction is committed to the county courts. In all, however, a similarity of form and procedure is observed—the mixture of judicial and administrative functions—modeled on the practice of the ecclesiastical courts and differing in a marked degree from the ordinary procedure of the common law. While such courts are of statutory creation, yet out of regard for their historical derivation they exercise their powers as the legitimate descendants of the ecclesiastical courts.⁷ The powers of the American tribunals are much broader than

⁷ "Courts of probate exercise many powers solely by virtue of our statutes; but they have very extensive jurisdiction not conferred by statute, but by a general reference to the existing law of the land, that is, to that branch of the common law known and acted upon for ages, the probate or ecclesiastical law." *Morgan v. Dodge*, 44 N. H. 255, 258, 82 Am. Dec. 218. *Finch v. Finch*, 14 Ga. 362.

those of the old ecclesiastical courts. It is intended to unite in them all of that jurisdiction, quasi-administrative in its character, in which the sovereign figures as *parens patriæ*; that is to say, not only the care and distribution of property the possession of which is vacated by the death of the owner, but also the protection of the persons and estates of those members of the community who are not *sui juris*, such as infants and lunatics.⁸ The statutes not only confer the probate jurisdiction formerly exercised by the ordinary, but have added much of the power over executors and administrators originally belonging to courts of equity, such as the power to require an accounting, to compel the payment of legacies, etc. There has also been added a concurrent jurisdiction with courts of law in adjudicating claims against the estate. The spirit of the statutes is to place in the probate court all powers, general and incidental, which are necessary in the prompt and complete administration of the estate without resort to other tribunals.⁹ However, probate courts are not courts of

⁸ *Heady v. Crouse*, 203 Mo. 100, 100 S. W. 1052, 120 Am. St. Rep. 643.

⁹ Much of the general control which courts of equity formerly exercised over the executors and administrators is now vested in the probate courts and equity can only interfere where there is not an adequate remedy in those courts. *Miller v. Woodward*, 8 Mo. 169-174; *Titterington v. Hooker*, 58 Mo. 593-598; *Pearce v. Calhoun*, 59 Mo. 271, 274; *Ensworth v. Curd*, 68 Mo. 282; *Holden v. Spier*, 65 Kan. 412, 70 Pac. 348; *Keith v. Guthrie*, 59 Kan. 200, 52 Pac. 435; *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86; *Coppedge v. Weaver*, 90 Ark. 444, 119 S. W. 678; *McArthur v. Scott*, 113 U. S. 340, 5 Sup.

equity,¹⁰ nor courts of general jurisdiction at common law.¹¹ They are courts of limited jurisdiction, having such powers only as are conferred by the statute

Ct. 652, 28 L. Ed. 1015; *Green v. Saulsbury*, 6 Del. Ch. 371, 33 Atl. 623; *Sowles v. First Nat. Bank* (C. C.) 54 Fed. 564 (Vt.); *Williams v. Miles*, 63 Neb. 859-865, 89 N. W. 451.

A federal court is without jurisdiction to determine matters purely of administration with respect to the estate of a decedent. *Northrup v. Browne*, 204 Fed. 224, 122 C. C. A. 496 (Kan.).

The rule that equity loses jurisdiction in these cases because of the enlargement of the powers of the probate courts is not established in all the states.

Any person entitled to share in the distribution of an estate has the right, by bill filed for that purpose, to have the administration settled in a court of equity, without showing any special equity. The original jurisdiction of equity is not defeated by the jurisdiction conferred on the orphans' court, unless *jurisdiction has attached*. *Gould v. Hayes*, 19 Ala. 439; *Moore v. Randolph's Adm'r*, 70 Ala. 575; *James v. Faulk*, 54 Ala. 184; *Hill v. Armistead*, 56 Ala. 118; *Teague v. Corbitt*, 57 Ala. 529; *Bragg v. Beers*, 71 Ala. 151; *Bromberg v. Bates*, 98 Ala. 621, 13 South. 557; *Baker v. Mitchell*, 109 Ala. 420, 20 South. 40; *Bromberg v. Bates*, 112 Ala. 363, 20 South. 786.

¹⁰ *Eddy v. Eddy*, 168 Fed. 590, 93 C. C. A. 586; *Bagnell v. Ives* (C. C.) 184 Fed. 466 (Pa.); *Canfield v. Canfield*, 118 Fed. 1, 55 C. C. A. 169 (Mich.); *Estate of Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; *Nerac's Estate*, 35 Cal. 392, 95 Am. Dec. 111; *Ross v. Wollard*, 75 Kan. 383, 89 Pac. 680; *Peterson v. Bauer*, 76 Neb. 652, 107 N. W. 993, 111 N. W. 361; *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379.

¹¹ *Treat v. Treat*, 35 Conn. 210-215; *Andersen v. Andersen*, 69 Neb. 565, 96 N. W. 276.

Probate jurisdiction, even when exercised by district court, does not extend to partition of land. *Mayo v. Tudor's Heirs*, 74 Tex. 471, 12 S. W. 117.

Nor trial of title to real estate. *Little v. Birdwell*, 21 Tex. 597, 73 Am. Dec. 242; *Allardyce v. Hambleton*, 96 Tex. 30, 70 S. W. 76; *Best v. Gralapp*, 69 Neb. 815, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491; *Higgins v. Vandever*, 85 Neb. 89, 122 N. W. 843.

creating them¹² and cannot decide controversies which are beyond the purposes of their creation, because the parties happen to be before them. Within their proper powers their findings are judicial, and, as in the case of other courts of competent jurisdiction, are not subject to collateral attack.¹³

¹² Carr v. Catlin, 13 Kan. 404.

Probate courts did not exist at common law and they have no power or jurisdiction by common law; their authority within the statute or constitutional provision creating them and defining their jurisdiction. Austin v. Chambers, 33 Okl. 40-44, 124 Pac. 310; Myrick v. Jacks, 33 Ark. 425; Monastes v. Catlin, 6 Or. 119; Christianson v. Kings County, 203 Fed. 894, 122 C. C. A. 188 (Wash.); Perea v. Barela, 5 N. M. 458-470, 23 Pac. 766; Ferris v. Higley, 20 Wall. 375, 22 L. Ed. 383.

The probate judge cannot, at the same time, act as trustee of a power under the will and as a judge; and where discretionary powers are such as would not belong to the court because of its jurisdiction over the subject matter of the trust independent of the authority of the will, the court will not exercise it. Attempt to have judge designate objects of a charitable bequest void. Estate of Pearsons, 113 Cal. 577, 45 Pac. 849, 1062; Druid Park Heights Co. v. Oettinger, 53 Md. 46.

¹³ Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299; Shoemaker v. Brown, 10 Kan. 383; Dilworth v. Rice, 48 Mo. 124-131; Rowden v. Brown, 91 Mo. 429, 4 S. W. 129; McGrews v. McGrews, 1 Stew. & P. (Ala.) 30; Apperson v. Cottrell, 3 Port. (Ala.) 51, 29 Am. Dec. 239; McElroy v. McElroy, 5 Ala. 81; Herbert v. Hanrick, 16 Ala. 581; Sowell v. Sowell's Adm'r, 41 Ala. 359; Rogers v. Kennard, 54 Tex. 30; Mills v. Herndon, 60 Tex. 353; Parnell v. Thompson, 81 Kan. 119, 105 Pac. 502, 33 L. R. A. (N. S.) 658; Bagley v. Bloom, 19 Cal. App. 255, 125 Pac. 931; In re Estate of Creighton, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; Beer v. Plant, 1 Neb. Unof. 372, 96 N. W. 348; Lethbridge v. Lauder, 13 Wyo. 9, 76 Pac. 682; Rice v. Tilton, 14 Wyo. 101, 82 Pac. 577; Nelson v. Bridge, 39 Tex. Civ. App. 283, 87 S. W. 885; King v. Battaglia, 38 Tex. Civ. App. 28, 84 S. W. 839; Murphy v. Sisters, 43 Tex. Civ. App. 638, 97 S. W. 135.

In respect to the settlements of successions to property on death the states are sovereign and may give to their courts the authority to determine finally as against all the world all questions that arise therein, subject to applicable constitutional limitations.

Where a decree of the probate court is final and bars all persons having claims against the estate, the courts of another state must, under the full faith and credit clause of the federal constitution, give similar force and effect to such a decree when rendered by a court having jurisdiction to probate the will and administer the estate.¹⁴

EXECUTORS AND ADMINISTRATORS

§ 189. Common law theory of executors

If the will names an executor who is willing and qualified to act, the duty devolves upon him to carry out its terms. By the theory of the common law the executor derived his powers directly from his appointment by the testator. The ecclesiastical courts could probate the will, but the executor did not need an appointment by them and they had very little control over him. He could do many acts by virtue of his position as executor, even before the will was probated.¹⁵ He was clothed with the general title to the personal property and might deal with it as his own. In case of his death his office together with the undis-

¹⁴ *Tilt v. Kelsey*, 207 U. S. 43, 28 Sup. Ct. 1, 52 L. Ed. 95.

¹⁵ *Marcy v. Marcy*, 32 Conn. 308.

posed of property passed to *his* executor. The testator might appoint any one as executor, whether qualified to perform the duties or not. In case the person so named was not able, by reason of infancy or otherwise, to discharge the office, a temporary administrator might be appointed to preserve the estate until he should become qualified. An executor was not permitted to charge any fees for his services, but retained the residuary personal estate for his own use. If, however, the will gave him a legacy, such legacy was by implication in lieu of all commissions and other interest in the estate.¹⁶ Much of this is changed by the modern American statutes.¹⁷ The law now prescribes certain qualifications for the executor, pro-

¹⁶ When a legacy is given to one who is appointed executor, whether the same he expressed as in consideration of care and pains or not, the law presumes that it was given in consideration of services as executor unless there are words in the will which show that it was founded on a different consideration; and the legacy must fail if the person so appointed does not qualify as executor. The provision made by our law for payment of commission to an executor, though weakening the strength of this presumption, is not necessarily so repugnant as to repel it. *Billingslea v. Moore*, 14 Ga. 370.

¹⁷ *Sinnott v. Kenaday*, 14 App. D. C. 1; *Kenan v. Graham*, 135 Ala. 585, 33 South. 699; *Chamberlin's Appeal*, 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204.

At common law, executors and administrators were regarded as the real owners of the property; and in fact for a long period were entitled to the residue, after the payment of the debts. It was not until the Statute of 22 Chas. II that administrators were definitely compelled to distribute the surplusage among the next of kin. The doctrine itself no longer exists at common law; but many of its traces are visible on the law of administration. No such principles or any resembling them were ever embodied in our various codes of jurisprudence. The heirs testamentary or ab intestato were always

vides for his appointment by the probate court,¹⁸ and requires him to give bond for the faithful discharge of his duties, unless expressly excused by the terms of the will.

The doctrine of the common law in this regard has not been adopted in most of the states. The executor here does not, as in England, derive his power solely from the will, but the law imposes certain obligations upon him before he is permitted to execute it. The fact that one is named in the will as executor does not, as at common law, make him executor in fact, but only gives him the legal right to become executor upon complying with the conditions required by law.¹⁹

§ 190. **Executor de son tort**

At common law if one intermeddled with the property of the deceased without authority, he made himself executor de son tort, or "of his own wrong." He was subject to all the burdens and liabilities of executorship, but was entitled to none of its benefits. As no public appointment of an executor was necessary,

regarded as the true owners of the succession and administrators as but trustees, with, it is true, important and very enlarged powers and obligations. *Bufford v. Holliman*, 10 Tex. 560, 575, 60 Am. Dec. 223; *Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574; *Fletcher v. Wormington*, 24 Kan. 259-264; *Foote v. Foote*, 61 Mich. 181, 28 N. W. 90; *Walworth v. Abel*, 52 Pa. 370.

¹⁸ *Gardner v. Gantt*, 19 Ala. 666.

¹⁹ *Stagg v. Green*, 47 Mo. 500; *Belton v. Summer*, 31 Fla. 139, 12 South. 371, 21 L. R. A. 146; *Thomas v. Williamson*, 51 Fla. 332, 40 South. 831; *Rice v. Tilton*, 13 Wyo. 420-431, 80 Pac. 828.

The nomination of an executor is evidence of the confidence reposed in him by the testator and courts will give weight to this intention and not set aside or remove the executor except for substantial cause. *Estate of Chadbourne*, 15 Cal. App. 363, 114 Pac. 1012.

any one who was found intermeddling with the goods thereby held himself out to creditors and others as the true executor, and must take the risk of being charged accordingly. Statutes providing for the appointment of an executor by the probate court have abrogated this common law rule.²⁰

§ 191. Appointment and qualification

The word "executor" need not be used if the will imposes duties on a person which clearly make him such.²¹ Where several executors are named in the will, and one only proves the will and receives letters, he only can act.²² A corporation, qualified under its charter, may be appointed executor and its paid up capital may dispense with the necessity for bond.²³ The appointment of an executor is not absolutely es-

²⁰ "All of the provisions of our statutes are wholly inconsistent with the idea of executor de son tort as at common law." Rozelle v. Harmon, 103 Mo. 343, 15 S. W. 432, 12 L. R. A. 187; Fox v. Van Norman, 11 Kan. 214; Litz v. Exchange Bank, 15 Okl. 564-572, 83 Pac. 790.

Executor de son tort exists in Connecticut. Marcy v. Marcy, 32 Conn. 308; Gleaton v. Lewis, 24 Ga. 209; Wilson v. Hall, 67 Ga. 53.

²¹ Stone v. Brown, 16 Tex. 425.

Trustee of testamentary trust does not become executor by implication. Crawford v. Horn, 40 Tex. Civ. App. 352, 89 S. W. 1097.

²² Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.

Powers delegated to named executors may be exercised by such as qualify notwithstanding they are called "joint executors." Act of 21 Hen. VIII, c. 4; Anderson v. Stockdale, 62 Tex. 54; McCown v. Terrell, 9 Tex. Civ. App. 66, 29 S. W. 484.

²³ Estate of Kilborn, 5 Cal. App. 161, 89 Pac. 985.

sential to a will.²⁴ The testator may provide for the appointment of an executor or of a substitute by the probate court.²⁵ An executor of an executor does not, as at common law, become as such executor of the first testator. Further as to the qualifications of an executor it is required in some states that he be and remain a resident of the state.²⁶ Removal from the state is a forfeiture of the office.

In some states it is still the rule that a married woman cannot be executrix, and that letters testamentary to a woman abate on her marriage.²⁷ In other states no distinction is made.²⁸

§ 192. Standard of responsibility

The care, prudence and judgment which the man of fair average capacity and ability exercises in the transaction of his own business furnishes the standard to govern an executor or administrator in the discharge of his trust duties.²⁹

²⁴ *Barton's Estate*, 52 Cal. 538; *Wolffe v. Loeb*, 98 Ala. 426, 13 South. 744.

²⁵ *State v. Rogers*, 1 Houst. (Del.) 569; *Bishop v. Bishop*, 56 Conn. 208, 14 Atl. 808.

Testator may designate successors to the executor. *Tuckerman v. Currier*, 54 Colo. 25, 129 Pac. 210; *Von Rosenberg v. Wickes*, 50 Tex. Civ. App. 455, 109 S. W. 968.

²⁶ Statutes may authorize appointment of non-resident. *Hecht v. Carey*, 13 Wyo. 154, 78 Pac. 705, 110 Am. St. Rep. 981.

Non-resident executor may take out letters in Alabama. *Keith v. Proctor*, 114 Ala. 676, 21 South. 502; *Leatherwood v. Sullivan*, 81 Ala. 458, 1 South. 718.

²⁷ *Baxter v. Wolfe*, 93 Ga. 334, 20 S. E. 325.

²⁸ *Airhart v. Murphy*, 32 Tex. 131.

²⁹ *In re Estate of Bush*, 89 Neb. 334, 131 N. W. 602.

An executor is not permitted to make private profit in his dealings with the property of the estate.³⁰

Executors represent generally the creditors and distributees of the estate.³¹

§ 193. Administrators—General—With the will annexed—Pending contest

If the person named in the will as executor is not qualified or refuses to act, after the will is duly probated an administrator is appointed, to whom letters of administration *with the will annexed* are granted. Such an administrator cum testamento annexo becomes in effect an executor and performs all the terms of the will except those which commit discretionary powers to the executor.³² A temporary administrator may also be appointed during a contest of the will, or during the minority or temporary ab-

³⁰ *Stitt v. Stitt*, 205 Mo. 155, 103 S. W. 547.

Every one who acquires assets by a breach of trust in the executor is responsible to those who are entitled to the assets if he is a party to the breach of trust. *Hargroves v. Batty*, 19 Ga. 130.

³¹ *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760; *Beall v. Blake*, 16 Ga. 119.

³² *Ochetree v. McDaniel*, 5 Pennewill (Del.) 288, 63 Atl. 687; *Curreran v. Ruth*, 4 Del. Ch. 27; *Compton v. McMahan*, 19 Mo. App. 494; *Francisco v. Wingfield*, 161 Mo. 542, 61 S. W. 842; *Frisby v. Withers*, 31 Tex. 134; *Moore v. Minerva*, 17 Tex. 20; *Beaty v. Stapleton*, 110 Ga. 580, 35 S. E. 770; *Avery v. Sims*, 69 Ga. 314; *Judson v. Bennett*, 233 Mo. 607, 136 S. W. 681; *Allen v. Barnes*, 5 Utah, 100, 12 Pac. 912.

Power of sale for purpose of distribution given to executor by the will may be carried out under the direction of the court by the administrator c. t. a. *McLeod v. Butts*, 89 Kan. 785, 132 Pac. 1174; *Ocheltree v. McDaniel*, 5 Pennewill (Del.) 288-294, 63 Atl. 687.

sence of the executor.³³ In the absence of a will, a general administrator is appointed by the court whose powers and duties are defined by the statutes.³⁴ Priority of right to appointment as administrator is given by law to certain relatives and distributees. Surviving partners have a prior right to administer upon the partnership estate.³⁵ If the persons entitled to administration fail to apply, as they are very likely to do if the estate be insolvent, administration may nevertheless be had at the instance of any creditor or other person interested. In some states there is an official known as public administrator whose duty it is to take charge of estates when no other person qualifies. If the administrator first appointed dies, resigns or is removed before the administration is completed, an administrator *de bonis non* (of goods not administered) is appointed to finish the task.

Executors generally, and all kinds of administrators must give bond for the faithful performance of their duties; usually in an amount double the value of the personal estate.³⁶

³³ *In re Estes*, 65 Mo. App. 38.

³⁴ Acts of an administrator prior to the discovery of a will are valid. *Tapley v. McPike*, 50 Mo. 589.

Under Georgia code, executor administers undevise as well as devised land. *Lamar v. Gardner*, 113 Ga. 781, 39 S. E. 498; *Knowles v. Knowles*, 132 Ga. 806, 65 S. E. 128.

The validity of a decree or order appointing an administrator, cannot be collaterally assailed or otherwise questioned except in a direct proceeding. *Burke v. Mutch*, 66 Ala. 568; *Barclift v. Treece*, 77 Ala. 528; *Breeding v. Breeding*, 128 Ala. 412, 30 South. 881.

³⁵ *Clark v. Fleischmann*, 81 Neb. 445, 116 N. W. 290.

³⁶ Grant of letter without bond is not void, but voidable. *Leather-*

§ 194. Title to real estate

The title to real estate does not, like that of personal property, vest primarily in the executor³⁷ but descends to the heir or vests in the devisees subject to the debts of the estate,³⁸ unless the statute or the provisions of the will confer upon the executor some title, power or right of possession.³⁹

Wood v. Sullivan, 81 Ala. 458, 1 South. 718; *Keith v. Proctor*, 114 Ala. 676, 21 South. 502.

Where a will has been admitted to probate, and the executors appointed without bond as provided in the will, whether they should be required to give bond was a matter exclusively for the court of probate of the state, and not within the jurisdiction of the federal court in a suit in equity involving the validity of the will. *Field v. Camp* (C. C.) 193 Fed. 160.

Executor may be removed by probate court for malfeasance, on petition of legatees. *Gibson v. Maxwell*, 85 Ga. 235, 11 S. E. 615.

Probate court has exclusive jurisdiction of accounts of executors. *Williams v. Williams*, 145 Mo. App. 382, 129 S. W. 454.

³⁷ *Tunnicliff v. Fox*, 68 Neb. 811, 94 N. W. 1032.

³⁸ *Clark v. Fleischmann*, 81 Neb. 445, 116 N. W. 290.

³⁹ If there are no debts against the estate, or there is sufficient other property subject to the payment thereof to pay all the debts, the title to the lands of a deceased person descends to his heirs, or passes to the devisees under his will, free of any claims of the administrator or right to the possession thereof. *Austin v. Chambers*, 33 Okl. 40-43, 124 Pac. 310; *Stewart v. Smiley*, 46 Ark. 373; *Sisk v. Almon*, 34 Ark. 391; *Tate v. Jay*, 31 Ark. 577; *Culberhouse v. Shirley*, 42 Ark. 25.

§ 195. Special powers of executors

The special powers that executors have as trustees have already been considered.⁴⁰ They may also have, under the terms of the will, special powers over the real estate greater than they would have by law generally. These are usually the power of encumbrance or sale of the realty, for the payment of debts or for distribution.⁴¹ No precise form of words is neces-

⁴⁰ See *Thomas v. Matthews*, 51 Tex. Civ. App. 304, 112 S. W. 120; *Weller v. Noffsinger*, 57 Neb. 455, 77 N. W. 1075; *Meek v. Briggs*, 87 Iowa, 610, 54 N. W. 456, 43 Am. St. Rep. 410; *Clark v. Fleischmann*, 81 Neb. 445, 116 N. W. 290.

It is inconsistent with law for testator, by direction to executors, to suspend the power of alienation for a period. *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825.

⁴¹ *Warner v. Conn. Mut. Life Ins. Co.*, 109 U. S. 357, 3 Sup. Ct. 221, 27 L. Ed. 962; *Leavens v. Butler*, 8 Port. (Ala.) 380; *In re Pearsons*, 98 Cal. 603, 33 Pac. 451; *Carpenter v. Webb*, 4 Pennewill (Del.) 34, 55 Atl. 1011; *Lockwood v. Stradley*, 1 Del. Ch. 298, 12 Am. Dec. 97; *Estate of Journey*, 7 Del. Ch. 1, 44 Atl. 795; *Griffith v. Stewart*, 31 App. D. C. 29; *Anderson v. Stockdale*, 62 Tex. 54; *Cardwell v. Rogers*, 76 Tex. 37, 12 S. W. 1006; *Jackson v. Williams*, 50 Ga. 553; *Neisler v. Moore*, 58 Ga. 334; *Smith v. Hulsey*, 62 Ga. 341; *Board v. Day*, 128 Ga. 156, 57 S. E. 359; *Hart v. Lewis*, 130 Ga. 504, 61 S. E. 26; *Satterfield v. Tate*, 132 Ga. 256, 64 S. E. 60; *Terry v. Rodahan*, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; *Anderson v. Holland*, 83 Ga. 330, 9 S. E. 670; *Napier v. Napier*, 89 Ga. 48, 14 S. E. 870; *Harwell v. Foster*, 102 Ga. 38, 28 S. E. 967; *Maxwell v. Willingham*, 101 Ga. 55, 28 S. E. 672; *Rakestraw v. Rakestraw*, 70 Ga. 806; *Connely v. Putnam*, 51 Tex. Civ. App. 233, 111 S. W. 164.

Power of sale must be executed by all who qualify. *Wolfe v. Hines*, 93 Ga. 329, 20 S. E. 322; *Board v. Day*, 128 Ga. 156, 57 S. E. 359; *Hoset Lbr. Co. v. Weeks*, 123 Ga. 336, 51 S. E. 439; s. c., 133 Ga. 472, 66 S. E. 168, 134 Am. St. Rep. 213; *Daugharty v. Drawdy*, 134 Ga. 650, 68 S. E. 472; *Johnson v. Bowden*, 37 Tex. 621; *Id.*, 43 Tex. 670.

Power of sale does not ordinarily include power to mortgage. *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247. But may. *Fletcher v.*

sary to confer power to sell upon the executor. Where a testator directs real estate to be sold, but names no one to do it, the power devolves upon the executor.⁴² But an executor has no implied powers, by virtue of his office, either to sell or to encumber lands. When not expressly empowered by the will he can only sell under order of the probate court, in accordance with statute.⁴³

Am. Tr. & B. Co., 111 Ga. 300, 36 S. E. 767, 78 Am. St. Rep. 164; *Bailie v. Kinchley*, 52 Ga. 487.

Distinction between a naked power to executors to sell land and a personal trust. *Anderson v. McGowan*, 42 Ala. 280; *Patton v. Crow*, 26 Ala. 426; *Tarver v. Haines*, 55 Ala. 503; *Watson v. Martin*, 75 Ala. 506.

⁴² *Blount v. Moore*, 54 Ala. 360; *State v. Hunter*, 73 Conn. 435, 47 Atl. 665; *Flinn v. Frank*, 8 Del. Ch. 186, 68 Atl. 196; *Leeds v. Sparks*, 8 Del. Ch. 280, 68 Atl. 239; *Schroeder v. Wilcox*, 39 Neb. 136, 57 N. W. 1031; *In re Estate of Manning*, 85 Neb. 60, 122 N. W. 711; *Griffith v. Witten*, 252 Mo. 627, 161 S. W. 708.

Presumption is that executors are invested with sufficient power to carry out testator's intentions. Where executors were directed to sell and convey the real estate for debts and distribution, legal title is vested in them. Such power must be exercised for the purpose of the will and none other. *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303.

⁴³ *Anderson v. Messinger*, 146 Fed. 929, 77 C. C. A. 179, 7 L. R. A. (N. S.) 1094; *Lester v. Kirtley*, 83 Ark. 554, 104 S. W. 213; *Neal v. Patten*, 40 Ga. 363; *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247; *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484.

At common law a power given to the executor to sell land did not pass to an administrator cum testamento annexo. *Lucas v. Price*, 4 Ala. 679.

But this rule has been broadened. *Schroeder v. Wilcox*, 39 Neb. 136, 57 N. W. 1031; *In re Estate of Manning*, 85 Neb. 60, 122 N. W. 711.

When an executor or administrator sells land under proper order of the court, liens thereon are divested and transferred to the proceeds of the sale. But a sale by an executor without order of court

Executors have no right to exercise discretion—even an honest discretion—beyond and above the duties of their office and the directions of the will.⁴⁴

§ 196. “Independent” administration

A direction in the will that the executor may act without taking out letters testamentary, as the statutes require, is held in most of the states to be of no legal effect.⁴⁵ But some states have what are known as “non-intervention” wills by which full powers are conferred on the executor to take possession of and wind up the estate of the testator without any judi-

under directions of will does not divest liens. *Hollinshed v. Woodard*, 124 Ga. 721, 52 S. E. 815.

Statute governs sales of real estate by executors except so far as expressly provided by will. *Walker's Estate*, 6 Utah, 369, 23 Pac. 930.

⁴⁴ *Ogiers' Estate*, 101 Cal. 381, 35 Pac. 900, 40 Am. St. Rep. 61.

Executors have no power to make subscription to railroad. *Judson v. Bennett*, 233 Mo. 607, 136 S. W. 681.

An executor who delays for an unreasonable time to sell cotton belonging to the estate because he believes it will advance in price is liable for the resulting loss by depreciation, even though he treated his own cotton the same way. *Pulliam v. Pulliam* (C. C.) 10 Fed. 53.

Provision in will of twenty-five thousand dollars for funeral expenses and monument to testator's memory, requesting that his remains be buried in a particular place, gives executors no power to spend two thousand dollars on his tomb and balance in construction of building for public library in city, with tablet to testator's memory. *Fancher v. Fancher*, 156 Cal. 13, 103 Pac. 206, 23 L. R. A. (N. S.) 944, 19 Ann. Cas. 1157.

⁴⁵ *Wall v. Bissell*, 125 U. S. 382, 388, 8 Sup. Ct. 979, 31 L. Ed. 772.

Attempts of the testator by provision in his will, to “overturn the statutes of the state upon the subject of administration of estates” are void. *State ex rel. v. Morrison*, 244 Mo. 193-202, 148 S. W. 907.

cial proceedings whatever, except those necessary to establish the will.⁴⁶

The statutes of Texas permit a testator to provide in his will that no other action shall be had in the county court in relation to the settlement of his estate than the probate and registration of his will and the return of an inventory of the estate. The validity of such a provision depends, of course, upon the validity of the will itself and does not deprive the court of jurisdiction to annul the will.⁴⁷ If a testator desires to remove his estate from the jurisdiction of the probate tribunal he should do so in plain and unambiguous terms: all doubts should be resolved in favor of the jurisdiction of the court.⁴⁸ In case, however, the words of the will are sufficient, the estate is withdrawn from the control of the court after the proof of the will and the filing of the inventory, and the court can make no further orders respecting it.⁴⁹

⁴⁶ *Korsstrom v. Barnes* (C. C.) 156 Fed. 280 (Wash.).

⁴⁷ *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Probate of a will as an "independent" one, when it was not so in fact, cannot be attacked collaterally. *Glover v. Coit*, 36 Tex. Civ. App. 104, 81 S. W. 136.

⁴⁸ *Epperson v. Reeves*, 35 Tex. Civ. App. 167, 79 S. W. 845; criticised and distinguished *Berry v. Hindman* (Tex. Civ. App.) 129 S. W. 1181; approved *Carlton v. Goebler*, 94 Tex. 97, 58 S. W. 829; distinguished *Hughes v. Mulanax*, 105 Tex. 576, 153 S. W. 299.

Sufficient words in will to comply with statute for administration without supervision of probate court. *Pierce v. Wallace*, 48 Tex. 399.

Insufficient words. *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

⁴⁹ *Lumpkin v. Smith*, 62 Tex. 249; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626; *McLane v. Belvin*, 47 Tex. 493; *Nelson v. Lyster*, 32 Tex. Civ. App. 356, 74 S. W. 54.

It cannot refuse letters to one named as independent executor in the will,⁵⁰ cannot fix or add to his compensation, grant him a final discharge, or appoint another independent executor in the room of one who dies.⁵¹

That the estate is insolvent does not disable a testator from exercising his power under the statute of exonerating his estate from the probate jurisdiction of the county court. A remedy is afforded creditors to force the executors, devisees, legatees or heirs to give bond for the protection of creditors. If the bond be not given upon the return of the citation, the estate is taken in charge by the court and administered as other estates.⁵² The power of executors to administer without control of the court is a personal trust in those named.⁵³ While joint action by

⁵⁰ *Journey v. Shook*, 105 Tex. 551, 152 S. W. 809.

⁵¹ *In re Estate of Grant*, 93 Tex. 68, 53 S. W. 372. Though an independent executor has qualified and commenced to administer the estate, the county court may, upon his application, place the estate again under control of the court. *King v. Battaglia*, 38 Tex. Civ. App. 28, 84 S. W. 839.

⁵² *Hogue v. Sims*, 9 Tex. 546; *Shackleford's Adm'x v. Gates*, 35 Tex. 781; *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549.

⁵³ *Blanton v. Mayes*, 58 Tex. 422.

A provision in a will, exempting the executor from taking the oath or giving the bond required by law and that the county court shall exercise no other control over the estate than probating the will and inventorying the property is a personal trust confided by the testator to the executor and the statute which gives the right to insert such a provision in a will contemplates an acceptance of the trust by the executors. Such special trust cannot be transferred by the master nor delegated to another by the county court, and where the executor fails to accept and qualify under the will and the court

all those who qualify is necessary,⁵⁴ those who qualify may act, though less than those named.⁵⁵

The appointment of an "independent" executor, without other provision either enlarging or restricting his powers, confers upon him authority to do without an order of court every act which an administrator could perform with such order, including the power to sell property,⁵⁶ even land,⁵⁷ for the payment of debts. It seems that if the will expressly gives the "independent" executor power to sell for the payment of debts, the existence of debts will be presumed,⁵⁸ otherwise the actual existence of debts must be shown and the burden is on the purchaser of land to show that such a condition existed as would have authorized the probate court to order the sale of the land.⁵⁹

appoints an administrator c. t. a. the clause is inoperative. *Langley v. Harris*, 23 Tex. 564.

⁵⁴ *McLane v. Belvin*, 47 Tex. 493.

⁵⁵ *Anderson v. Stockdale*, 62 Tex. 54-60; *Johnson v. Bowden*, 43 Tex. 670; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626; *McDonald v. Hamblen*, 78 Tex. 628, 14 S. W. 1042.

⁵⁶ *Carlton v. Goebler*, 94 Tex. 93, 58 S. W. 829; *Thomson v. Shackelford*, 6 Tex. Civ. App. 121, 24 S. W. 980.

⁵⁷ *Hughes v. Mulanax*, 105 Tex. 576, 153 S. W. 299.

In the absence of express power independent executor cannot sell land except for purpose of paying debts of estate. *Johnson v. Short*, 43 Tex. Civ. App. 128, 94 S. W. 1082.

⁵⁸ *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2; *Rogers v. Jones*, 13 Tex. Civ. App. 453, 35 S. W. 812.

⁵⁹ *Haring v. Shelton*, 103 Tex. 10, 122 S. W. 13.

We think it may be doubted whether the power granted by a will to independent executors to "settle the affairs" or "settle up the estate" of the testator confers upon such executors the power to sell and convey real estate. *Wright v. Dunn*, 73 Tex. 293, 11 S. W. 330.

Powers of "independent" executor. *McDonough v. Cross*, 40 Tex.

Nebraska has a statutory provision for dispensing with administration on the giving of a bond by the residuary legatee.⁶⁰

§ 197. Primary and ancillary administrations

It is a general rule of law that each state or sovereignty reserves to itself the right to administer the goods of a deceased person actually found within its borders. It matters not whether the owner was a resident or a non-resident, if the goods are within the state the custody and control of them vests in the local tribunals.⁶¹ This is for the purpose of securing and protecting the rights of local creditors and distributees, and the control thus assumed is exercised in

251; *Cooper v. Homer*, 62 Tex. 356; *Faulk v. Dashiele*, 62 Tex. 642, 50 Am. Rep. 542; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40; *Lagow v. Glover*, 77 Tex. 448, 14 S. W. 141; *Hallum v. Silliman*, 78 Tex. 347, 14 S. W. 797; *Eskridge v. Patterson*, 78 Tex. 417, 14 S. W. 1000; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Prieto v. Leonards*, 32 Tex. Civ. App. 205, 74 S. W. 41; *Epperson v. Reeves*, 35 Tex. Civ. App. 167, 79 S. W. 845; *Carleton v. Hausler*, 20 Tex. Civ. App. 275, 49 S. W. 118.

"Independent" executor with special powers by terms of will. *Cardwell v. Rogers*, 76 Tex. 37, 12 S. W. 1006.

It is not true that independent executors can do whatever the testator could do if living. They must find their powers in the will. *Dealy v. Shepherd*, 54 Tex. Civ. App. 80, 116 S. W. 638.

In the absence of authority conferred by the will an independent executor is without authority to partition the estate among the devisees. *Johnson v. Short*, 43 Tex. Civ. App. 128, 94 S. W. 1082.

⁶⁰ *In re Estate of Pope*, 83 Neb. 723, 120 N. W. 191.

And Texas. *Hummel v. Del Greco*, 40 Tex. Civ. App. 510, 90 S. W. 339.

⁶¹ *Bartlett v. Hyde*, 3 Mo. 490; *Lecouturier v. Ickelheimer* (D. C.) 205 Fed. 682 (N. Y.).

complete harmony with the principle that the goods are to be finally distributed according to the law of the owner's domicile.

It is a settled rule of law that the administration of all the goods of an intestate, wherever situated or found, is to be made according to the law of his domicile. When they are in a different country they are first applied, under the laws of that country, to the satisfaction of the claims of creditors who establish their claims under its laws; and if there are any of its citizens that claim as distributees, distribution of the assets will be made there. But after the claims of creditors are satisfied, and when the distributees reside in the country of the intestate's domicile, or there are other creditors there whose claims remain unsatisfied, the tribunals of the country in which the assets are found will direct them to be remitted to the country of the domicile for further administration. In determining whether assets of a deceased person shall be transferred from this state, the first thing to be ascertained is, where did the intestate have his domicile. In whatever state that may have been, the administration granted there is the principal one, and that in any other state is ancillary, and priority of administration has no effect on this question.⁶²

Letters testamentary or of administration granted in one state have no extra-territorial force.⁶³ The

⁶² *Spraddling v. Tipkin*, 15 Mo. 118.

⁶³ *McCarty v. Hall*, 13 Mo. 480; *Naylor v. Moffatt*, 29 Mo. 126; *State v. St. Louis County Court*, 47 Mo. 602; *Cabanne v. Skinker*, 56 Mo. 357-367; *McPike v. McPike*, 111 Mo. 225, 20 S. W. 12; *Gregory v. McCormick*, 120 Mo. 657, 25 S. W. 565; *Emmons v. Gordon*, 140 Mo. 490, 41 S. W. 998, 62 Am. St. Rep. 734; *Rentschler v. Jamison*, 6 Mo. App. 135; *Wilkinson v. Leland*, 2 Pet. 627, 7 L. Ed. 542; *Kerr v. Moon*, 9 Wheat. 565, 6 L. Ed. 161; *Murdoch v. Murdoch*, 81 Conn. 681, 72 Atl. 290, 129 Am. St. Rep. 231; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *Mattison v. B. & M. R. R.* (D. C.) 205 Fed. 821 (N. Y.); *St. Bernard v. Shane* (D. C.) 201 Fed. 453 (Ohio).

authority of an executor or administrator does not extend beyond the limits of the government which granted to him his letters unless the laws of the foreign state controlling the assets permit it.⁶⁴ In some states, as in Missouri, this rule is enforced strictly; and a foreign executor or administrator has no title, as such, to any property in this state, cannot take possession of any assets, collect any debts, sue or be sued, or exercise any of his powers there.⁶⁵ In other states, as in Kansas, the local statutes and a policy of comity confer upon foreign executors and administrators, in the absence of a local administration, power to act within the state, and to take possession of assets, collect debts, sue and be sued, etc.⁶⁶ The extent to which this is permitted is entirely a matter of local policy, so that it remains true that each state controls as it sees fit the administration of property found within its borders.

⁶⁴ *In re Estate of Ames*, 52 Mo. 290; *Emmons v. Gordon*, 140 Mo. 498, 41 S. W. 998, 62 Am. St. Rep. 734; *Moore v. Jordan*, 36 Kan. 271, 13 Pac. 337, 59 Am. Rep. 550.

Foreign executor may sue on judgment obtained by him in other state. *Arizona Cattle Co. v. Huber*, 4 Ariz. 69, 33 Pac. 555.

⁶⁵ Administration may be taken out here whether there is any at place of domicile or not. *Wood v. Matthews*, 73 Mo. 483; *Simpson v. Foster*, 46 Tex. 618; *Wills v. Herndon*, 60 Tex. 353.

⁶⁶ *K. P. Ry. Co. v. Cutler*, 16 Kan. 568; *Cady v. Bard*, 21 Kan. 667; *Denny v. Faulkner*, 22 Kan. 89; *Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389; *Donifelser v. Heyl*, 7 Kan. App. 606, 52 Pac. 468; *Niquette v. Green*, 81 Kan. 569, 106 Pac. 1270; *Bank v. Harrison*, 68 Ga. 463-471; *Jackson v. Phillips*, 57 Neb. 189, 77 N. W. 683; *Estate of Meier*, 165 Cal. 456, 132 Pac. 764, 48 L. R. A. (N. S.) 858; *De Zbrani-kov v. Burnett*, 10 Tex. Civ. App. 442, 31 S. W. 71; *Tunnicliff v. Fox*, 68 Neb. 811, 94 N. W. 1032.

In case, therefore, the goods of a decedent are in two or more states or countries, there are or may be two or more separate administrations upon his estate. That granted in the state of the decedent's domicile is the primary administration, and the other or others are ancillary administrations, without regard to which is prior in point of time.⁶⁷ These several administrations are separate and distinct. The primary administrator and the ancillary administrator are separate officers and neither is accountable to the other, but each to the court that appointed him.

Where there is a primary and an ancillary administration of an estate, if the tribunals having jurisdiction of the ancillary administration can distribute or remit the assets, the court having jurisdiction of the primary administration will not interfere within the limits of the ancillary administration.⁶⁸

⁶⁷ *B. & O. Ry. v. Evans*, 188 Fed. 6, 110 C. C. A. 156; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *Bealey v. Smith*, 158 Mo. 515, 59 S. W. 984, 81 Am. St. Rep. 317. The domicile of a wife is that of her husband for the purpose of determining primary administration. *McPherson v. McPherson*, 70 Mo. App. 330.

Administration of non-resident will be granted in any county where there are bona notabilia, and the court first taking jurisdiction will retain it. *Arnold v. Arnold*, 62 Ga. 627.

Ancillary administration to one interested in will in preference to public administrators. *Estate of Rankin*, 164 Cal. 138, 127 Pac. 1034.

⁶⁸ *State v. Campbell*, 10 Mo. 724.

Where funds belonging to the estate of a decedent are in the possession of a probate court of a state acquired in ancillary proceedings a federal court cannot disturb such possession by ordering the funds transmitted to the principal administrator in another state, nor can it entertain a suit by such foreign administrator against the local administrator to determine the right to such fund, where by the law of the state the probate court having the fund alone has jurisdiction to make such adjudication subject to review on appeal. *Watkins v.*

If the estate is solvent, the ordinary course is for the tribunal having the ancillary administration to pay the local creditors, reserve sufficient to satisfy the local distributees and remit the surplus, if any, to the court of primary administration.⁶⁹ If the estate, as a whole, is insolvent, more difficult questions of adjustment arise. The court having ancillary administration will at all events endeavor to secure to local creditors the just proportion of their claims out of the assets under its charge, and will not send them to a foreign tribunal to enforce their rights. It need not, however, permit foreign creditors to come in and exhaust the funds.⁷⁰

Eaton (C. C.) 173 Fed. 133 (1909 N. Y.); Chase v. Wetzlar, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990.

⁶⁹ Higgins v. Eaton (C. C.) 178 Fed. 153; Id. (C. C.) 188 Fed. 938; Green v. Byrne, 46 Ark. 453; Irwin's Appeal, 33 Conn. 136; Watkins v. Eaton (C. C.) 173 Fed. 133; Keith v. Proctor, 114 Ala. 676, 21 South. 502.

⁷⁰ Whether personal property of a testator, situated in another state and in the possession of a probate court therein, shall be transmitted to the court of the domicile of the testator for distribution is a matter of judicial discretion, to be exercised by any court having jurisdiction; but under the law of New York as settled by decision where there is a difference of opinion between the probate courts of the two jurisdictions as to the construction of the will, which has been probated in both, the property should be remitted to the jurisdiction of domicile. Watkins v. Eaton (C. C.) 173 Fed. 133. See, also, Estate of Lathrop, 165 Cal. 243, 131 Pac. 752; In re Hughes, 95 N. Y. 55.

§ 198. Collection and preservation of estates

The whole scheme of our statutes contemplates that the estates of deceased persons shall first pass through administration for the purpose of collecting the property, ascertaining its true value and protecting the claims of creditors.⁷¹ The property is, in a very true sense, in the custody of the law and the next of kin and distributees cannot sue for it or establish any title to it except through administration.⁷² The common law regarded the executor and administrator as the absolute owner of the personal estate. He could sell it and deal with it as his own, but this doctrine of the common law does not prevail under the American statutes.⁷³ Though an executor derives his power from a will, he must be appointed by the court before he is entitled to deal with the property.⁷⁴ The common law rule that the appointment of one as execu-

⁷¹ *State ex rel. Hounsom v. Moore*, 18 Mo. App. 406; *Tye v. Tye*, 88 Mo. App. 334.

⁷² *Hall v. Haywood*, 77 Tex. 4, 13 S. W. 612; *Acklin v. Paschal*, 48 Tex. 147; *Simpson v. Foster*, 46 Tex. 618.

The general rule is that while administration is pending on an estate, a suit for the recovery of the property of the estate should be brought by the administrator. To this rule there are two exceptions: First when the administrator cannot or will not act for the protection of those beneficially interested. Second: When the interests of the administrator are adverse to the estate. *Rogers v. Kennard*, 54 Tex. 30; *Crain v. Crain*, 17 Tex. 80.

Executor in possession of property has right to sue for negligent tort. *Hendricks v. So. Ry. Co.*, 123 Ga. 342, 51 S. E. 415.

⁷³ *Boeger v. Langenberg*, 42 Mo. App. 7.

⁷⁴ *Stagg v. Green*, 47 Mo. 500; *Lamb v. Helm*, 56 Mo. 431; *Stagg v. Linnenfelser*, 59 Mo. 341.

tor discharged all debts owing by such person to the testator is abolished generally by statute.⁷⁵ He has no power to dispose of assets without an order of court.⁷⁶

The first duty of an executor or administrator, after being duly commissioned, is to collect and take possession of the estate, make an inventory of it and have it appraised. He is empowered to collect all debts and represent the estate in prosecuting or defending all actions brought by or against it. Such special powers as he needs may, in a proper case, be given him by order of court. While he may not follow the property into a foreign state except by permission of the laws thereof, yet if a debt or judgment has once vested in him he may sue upon it in a foreign state by virtue of his general character as trustee.⁷⁷ The statutes provide how and when the personal property shall be sold and the disposition to be made of the proceeds.

The executor or administrator, *as such*, except by

⁷⁵ *State ex rel. v. Morrison*, 244 Mo. 193, 148 S. W. 907.

Nor is a debt released by giving a legacy to the debtor without mentioning the debt. *Sorrelle's Ex'r v. Sorrelle*, 5 Ala. 245.

Debts owing to the testator by his children are not released by implication. *Sorrelle v. Craig*, 8 Ala. 566.

⁷⁶ *Chandler v. Stevenson*, 68 Mo. 450; *Weil v. Jones*, 70 Mo. 560; *State v. Berning*, 74 Mo. 96; *Mosman v. Bender*, 80 Mo. 579.

Executors not personally liable to legatees for loss occasioned by following directions of will as to sale of property. *Northrup v. Browne*, 204 Fed. 224, 122 C. C. A. 496 (Kan.).

⁷⁷ *Hall v. Harrison*, 21 Mo. 227, 64 Am. Dec. 225; *Tittman v. Thornton*, 107 Mo. 506, 17 S. W. 979, 16 L. R. A. 410.

special statutes, takes no interest in the land of the deceased.⁷⁸ An executor however, may be clothed with a title to the land, or a power of sale of it, by the terms of the will; in which case he acts more in the character of an express trustee or donee of a power than simply as executor. By statute, also, both executors and administrators may be given power, by order of the probate court, to lease, repair or sell the realty or to redeem it from mortgages and liens.⁷⁹

Federal courts have no original jurisdiction with respect to the administration of decedent's estates, and they cannot, by entertaining jurisdiction of a suit against the administrator which they have the power to do in certain cases, draw to themselves the full possession of the res, or invest themselves with the authority of determining all claims against it.⁸⁰

⁷⁸ *Burdyne v. Mackey*, 7 Mo. 374; *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375.

Devisee may prosecute ejectment for the lands devised to him during the pendency of probate proceedings. *Beer v. Plant*, 1 Neb. (Unof.) 372, 96 N. W. 348; *Lantry v. Wolf*, 49 Neb. 374, 68 N. W. 494.

Under statute executor or administrator has right to possession of all real estate and personal property belonging to estate. *Tillson v. Holloway*, 90 Neb. 481, 134 N. W. 232, Ann. Cas. 1913B, 78.

"Real estate" does not include a lease for twenty years, which is personal estate passing primarily to the executor. *Orchard v. Store Co.*, 225 Mo. 414, 125 S. W. 486, 20 Ann. Cas. 1072.

⁷⁹ *Langston v. Canterbury*, 173 Mo. 131, 73 S. W. 151; *Bealey v. Blake*, 70 Mo. App. 229; *Higgins v. Reed*, 48 Kan. 272, 29 Pac. 389; *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372.

Unless expressly given otherwise by the will power of sale for the payment of debts and legacies must be made in the course of administration. *Haldeman v. Openheimer*, 103 Tex. 275, 126 S. W. 566.

⁸⁰ *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

Every executor and administrator is also required by statute to file in the court which appointed him periodical settlements, or statements of his accounts, showing all money collected and disbursed with proper receipts for each payment. The annual settlements are not conclusive upon any of the parties, but the final settlement, made after due notice, has the effect of a final judgment.⁸¹

To the general rule that administration is necessary in all cases there is one exception made by the statute. If the entire estate is so small that it does not exceed in value what would be allowed to the widower, widow or minor children as their absolute property free from the claims of creditors, the probate court may refuse administration and allow the widow to collect and retain the assets. The amount allowed the widow and minor children in such case usually corresponds with the property which was exempt from execution during the lifetime of the deceased.⁸²

For the purpose of providing for the immediate wants of the widow and minor children, pending the settlement of the estate, the statutes provide that the court may order such sums paid to the widow out of the rents of the real estate as may be in pro-

⁸¹ *State ex rel. v. Gray*, 106 Mo. 526, 17 S. W. 500.

⁸² *Eans v. Eans*, 79 Mo. 53; *Griswold v. Mattix*, 21 Mo. App. 282; *Estate of Garrity*, 108 Cal. 463, 38 Pac. 628, 41 Pac. 485.

This right does not extend to non-resident widows. *Richardson v. Lewis*, 21 Mo. App. 531.

portion to her interests therein, until her dower is assigned; and also that the court may, as occasion requires, and without prejudice to creditors, appropriate sums to the support of minor children, which shall be charged against the distributive shares of such children.⁸³

ALLOWANCE AND CLASSIFICATION OF DEMANDS

§ 199. Common law provision for allowance of demands

At common law the provisions for the allowance of demands against the estate of the deceased and the payment of his debts were very crude and imperfect; subjecting the creditor to delay, expense, uncertainty, and often injustice. They operated with similar hardship upon the executor or administrator; involving him in tedious and expensive litigation, with its attendant risk, and holding him responsible for innocent mistakes and omissions. The hardships of the English system arose partly from the fact that the law established a highly artificial classification of demands—dividing them into debts by specialty and debts by simple contract: a division not founded upon the nature of the debt, but upon the particular form in which it was made. It required the executor or administrator to ascertain at his peril the existence and validity of such

⁸³ *Richardson v. Frederitze*, 35 Mo. 266; *In re Estate of Manning*, 85 Neb. 60, 122 N. W. 711.

demands, and held him personally responsible if by paying claims of a lower order he left himself without sufficient assets to pay subsequently discovered claims of a higher order.

But perhaps the principal difficulty was that two separate tribunals exercised power over the representative, neither of which appointed him, or supervised his general administration of the estate. Claims could be established either in the common law courts or in chancery. At common law the executor was regarded as the real owner of the property. He could not only sue, but could be sued personally for all claims against the estate; provided assets could be traced into his hands. He must assume the whole burden of defending or of showing the existence of other and superior claims to the property. Equity, however, regarded him as a trustee and would marshal the assets in his hands and order them to be distributed according to the respective priorities of the claims. The comprehensive jurisdiction of equity was the only protection that the executor had. If he were shrewd he would throw the estate into chancery, thus greatly increasing the delay and expense to the small creditors. If he were not shrewd, he would allow claims to be established against him at law, and thus involve himself personally in the risk of making the estate pay out.

§ 200. American statutes providing for allowance in probate courts

The American statutes have sought to reform and simplify this cumbrous method of establishing and paying demands in the following rational ways:

First: By conferring upon the probate court jurisdiction to allow demands and order their payment.

Second: By discouraging creditors from resorting to other tribunals for the adjudication of their claims.⁸⁴

Third: By creating a classification of demands, based upon public policy, for the protection of certain creditors.

Fourth: By providing a short time limit, known as the statute of non-claim, within which demands must be presented for allowance or be forever barred.

The provisions of the administration statute are designed to supersede the more cumbrous machinery of the common law in regard to the assets of the estate and the payment of debts.⁸⁵ The probate court has jurisdiction of money demands against

⁸⁴ Between the death of the intestate and the granting of letters of administration the title and right to possession of personal property is suspended and vested in no one. A chattel mortgagee cannot seize or sell the property under his mortgage. *Litz v. Exchange Bank*, 15 Okl. 564-571, 83 Pac. 790.

⁸⁵ *Titterington v. Hooker*, 58 Mo. 597.

the estate of a deceased person, whether such demands be of a legal or equitable character.⁸⁶

In securing the allowance of a demand the creditor is required first to *exhibit* his claim to the executor or administrator. This exhibition of the claim is strictly insisted upon as it affects the priorities of other creditors.⁸⁷ The executor or administrator must list and classify the demands thus exhibited and report the same to the court. The exhibition of the demand does not entitle the executor or administrator to pay it, even though he be satisfied of its correctness. It must be allowed by the court, which is a judicial act.⁸⁸ The claimant must make affidavit to his claim, even though it be a judgment rendered in the lifetime of the deceased.⁸⁹

⁸⁶ *Hoffmann v. Hoffmann*, 126 Mo. 486, 29 S. W. 603.

A wife, who has separate personal estate in her husband's lands, may after his death, prove her claim and have it allowed against his estate in the probate court. *Todd v. Terry*, 26 Mo. App. 598; *Reynolds v. Reynolds*, 65 Mo. App. 415; *Church v. Church*, 73 Mo. App. 421.

Appeal lies from probate court on the approval of a claim and is tried *de novo*. *Moore v. Hardison*, 10 Tex. 467.

⁸⁷ *Pfeiffer v. Suss*, 73 Mo. 245; *Burckhardt v. Helfrich*, 77 Mo. 376.

Commencing suit against the administrator is equivalent to exhibition of demand. *Tevis v. Tevis*, 23 Mo. 256; *Wernse v. McPike*, 100 Mo. 476, 13 S. W. 809; section 2957, G. S. Kan. 1905.

Exhibition to one executor is sufficient. *Clark v. Parkville R. R.*, 5 Kan. 654.

⁸⁸ If executors pay demand before allowance and it turns out to be legal and the personal estate ample to pay all the debts no one can complain. *Judson v. Bennett*, 233 Mo. 607, 136 S. W. 681.

⁸⁹ *Merchants' Bank v. Ward*, 45 Mo. 310; *Clawson v. McCune*, 20 Kan. 337; *Scroggs v. Tutt*, 20 Kan. 271.

Judgment against defendant as executrix in another state is not

To obtain an adjudication in court the creditor must, in addition to the exhibition of his demand, summon the executor or administrator, as a party defendant, to a hearing.

At common law the executor had a right to retain sufficient assets to pay a debt owing to himself.⁹⁰ This doctrine of retainer has been abolished in most states.⁹¹

If the executor or administrator has himself a claim against the estate, he must establish it by a proceeding against his co-executor or co-administrator, or against a temporary administrator appointed for that purpose.

§ 201. Creditor should seek probate court

While the proceedings in the probate court for the allowance of a claim are summary, and without formal pleadings, yet the law contemplates a judicial proceeding.⁹²

The judgment of allowance in the probate court is as conclusive as the judgment of any other court and cannot be opened on any other ground except such as would equally apply to the judgments of other courts.⁹³

The law, having thus provided a fairly ample remedy for the creditor in the probate court, dis-

sufficient to establish claim against the estate here. *Webster v. Clarke*, 100 Tex. 333, 99 S. W. 1019, 123 Am. St. Rep. 813.

⁹⁰ *Harkins v. Hughes*, 60 Ala. 316.

⁹¹ *Nelson v. Russell*, 15 Mo. 356.

⁹² *Williams v. Gerber*, 75 Mo. App. 18.

⁹³ *Munday v. Leeper*, 120 Mo. 417, 25 S. W. 381; *Clark v. Bettelheim*, 144 Mo. 258, 46 S. W. 135.

courages a resort to other tribunals for the establishment of demands, with its attendant increase of costs.⁹⁴ But such restrictions apply only to cases in which the probate court is able to do full justice to the claimant. As such courts have no equity powers⁹⁵ it follows that in all cases of a purely equitable nature, such as trust estates, accounting, and the like, resort may be had to the courts of general jurisdiction.⁹⁶

§ 202. Statutes of non-claim

Most states provide by statute a period, usually two, sometimes three, years within which claims against the estate must be exhibited and proved, with a saving exception in favor of persons not sui juris. The importance of this statute of non-claim, as it is called, is that it ascertains with some degree of definiteness the obligations of the estate, and especially it advises the heirs and others who are

⁹⁴ *Johnson v. Cain*, 15 Kan. 537; *Stratton v. McCandless*, 27 Kan. 296; *Kothman v. Markson*, 34 Kan. 550, 9 Pac. 218; *Richardson v. Palmer*, 24 Mo. App. 480; *Nichols v. Reyburn*, 55 Mo. App. 1.

⁹⁵ *Pres. Church v. McElhinney*, 61 Mo. 540; *First Baptist Church v. Robberson*, 71 Mo. 326; *Butler v. Lawson*, 72 Mo. 227; *Bramell v. Cole*, 136 Mo. 210, 37 S. W. 924, 58 Am. St. Rep. 619; *Carr v. Catlin*, 13 Kan. 393.

⁹⁶ *Reed v. Crissey*, 63 Mo. App. 184; *Shoemaker v. Brown*, 10 Kan. 383; *In re Hyde*, 47 Kan. 281, 27 Pac. 1001.

A demand against the decedent's estate, to which there exists an equitable set-off, may be adjusted in a court of equity before being allowed in probate court. Such jurisdiction may be exercised by federal courts of equity. *Schwarz v. Harris* (D. C.) 206 Fed. 936 (Or.).

dealing with the realty whether the land will probably be sold to satisfy the debts. This bar in the statute is, however, based upon a due compliance with the law in regard to giving notice to creditors.⁹⁷

§ 203. Jurisdiction of federal courts over claims

Federal courts act with reference to estates of deceased persons only to ascertain and enforce claims between citizens of different states after the state courts have probated the will or established intestacy.⁹⁸

A citizen of another state may proceed in the federal courts to establish a debt against the estate, but the debt thus established must take its place and share in the estate as administered by the probate court; it cannot be enforced by direct process against the estate itself.⁹⁹

⁹⁷ *Wilson v. Gregory*, 61 Mo. 421; *Jones v. Davis*, 37 Mo. App. 69; *Toby v. Allen*, 3 Kan. 399-413.

In Kansas debts are barred by lapse of three years after time when administrator might have been appointed. *Brown v. Baxter*, 77 Kan. 97, 108, 94 Pac. 155, 574; *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; *Bank v. King*, 60 Kan. 733-737, 57 Pac. 952.

Under the probate act of 1870 no administration can be granted after four years have elapsed from the death of the testator. After that time the presumption is that there are no debts or if any that they are barred by limitation, and that the property has gone with the possession of the person entitled to receive it. *Loyd v. Mason*, 38 Tex. 212.

Under the New York statute creditors who have not proved their claims during the course of ordinary administration may sue legatees or devisees. *Miller v. Steele*, 153 Fed. 714, 82 C. C. A. 572.

⁹⁸ *Underground Electric Ry. Co. v. Owsley* (C. C.) 169 Fed. 671; *Id.*, 176 Fed. 26, 99 C. C. A. 500 (N. Y.).

⁹⁹ *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867.

§ 204. Statutory classification of claims

The common law classification of claims has been done away with.

The statutes provide a simple, plain classification of demands and the court designates the proper class at the time of allowance. Some statutes permit claims legally exhibited within the first year to be placed in a higher class than those exhibited in the second year, thus encouraging the early presentation of demands, and greatly facilitating the settlement of estates, especially insolvent estates.

§ 205. Debts: ante mortem and post mortem

With the exception of funeral expenses (which were a charge against the executor at common law) this classification obviously applies only to debts in existence at the time of the death. Debts accruing after the death would be either taxes and other charges growing out of the realty; or debts incurred by the executor or administrator in the management of the estate. The executor or administrator is not required to pay taxes on the realty of the deceased that are not a charge against the same at the time of the death, except where he is in possession of the realty under an order of court.¹ He is required, however, to pay taxes on the personal estate, whether assessed before or after the death,²

¹ *Griffin v. Fleming*, 72 Ga. 697.

² *State ex rel. v. Tittmann*, 103 Mo. 565, 15 S. W. 936.

and he is required to pay the court costs, as well as all other legitimate expenses of the administration without regard to the classification. The legitimate expenses of the administration include his own fees and such other debts as he may have incurred for collecting and preserving the estate; such as feeding and caring for the live stock,³ attorneys' fees,⁴ and even traveling expenses.⁵ The powers of an executor are sometimes enlarged by the terms of the will, but except for such enlargement, neither an executor nor an administrator can create liabilities against the estate by his acts or contracts in excess of his express statutory power.⁶

A contract by an administrator in his representative capacity can only be enforced against the assets of the estate when he is authorized by statute to make it for the benefit of the estate.⁷

³ *Powell v. Powell*, 23 Mo. App. 365.

⁴ *Gamble v. Gibson*, 59 Mo. 585; *Nichols v. Reyburn*, 55 Mo. App. 1; *State v. Walsh*, 67 Mo. App. 348; *Nelson v. Schoonover*, 89 Kan. 779, 132 Pac. 1183; *St. James O. A. v. McDonald*, 76 Neb. 625, 107 N. W. 979, 110 N. W. 626; *In re Estate of Bush*, 89 Neb. 334, 131 N. W. 602.

⁵ *Williams v. Petticrew*, 62 Mo. 460.

⁶ *Smarr v. McMaster*, 35 Mo. 351; *Zinc Co. v. Freeman*, 68 Kan. 691, 75 Pac. 995; *Fridenburg v. Wilson*, 20 Fla. 359; *Harris v. Woodward*, 133 Ga. 104, 65 S. E. 250.

The term "debts" in a will, without explanatory words clearly extending its meaning, does not include liabilities arising after the testatrix's death or charges imposed by law. *Nash v. Ober*, 2 App. D. C. 304.

⁷ Held that he had no right to employ an expert accountant. *Yeakle v. Priest*, 61 Mo. App. 47.

Contracts in excess of his power bind him personally.⁸ The estate is not liable for the torts of an administrator,⁹ nor for the expenses of an inquest,¹⁰ nor can even court costs be made a pretext for selling the realty when there was no personal property to administer,¹¹ and court costs, expenses and attorney's fees incurred by the executor in unsuccessfully defending a charge of misconduct cannot be charged to the estate.¹²

§ 206. Payment of demands

All demands against the estate, after being duly allowed, shall be paid by the executor or administrator, so far as he has assets, in the order in which they are classed; and if the assets be insufficient to pay the whole of any one class, then *pro rata*. The allowance of a demand against an estate is a judgment of which the executor or administrator is bound to take notice,¹³ and he should not pay claims

⁸ *Studebaker v. Montgomery*, 74 Mo. 101; *Stirling v. Winter*, 80 Mo. 141.

⁹ *Richardson v. Palmer*, 24 Mo. App. 480.

¹⁰ *Houts v. McCluney*, 102 Mo. 13, 14 S. W. 766.

¹¹ *Pres. Church v. McElhinney*, 61 Mo. 540.

¹² *Sill v. Sill*, 39 Kan. 189, 17 Pac. 665.

¹³ *Kennerly v. Shepley*, 15 Mo. 640, 57 Am. Dec. 219.

General creditors cannot intervene in suits against a representative of an estate. *Shackleford's Adm'x v. Gates*, 35 Tex. 781.

The direction in a will that the executor should pay all just debts does not mean that he should pay unprobated debts. *Kaufman v. Redwine*, 97 Ark. 546, 134 S. W. 1193.

Administrator or executor can reap no personal advantage by paying debts for less than is due upon them—the profit results to other creditors and legatees. *Whitley v. State*, 38 Ga. 50.

of a lower class without retaining sufficient to pay those of a higher; or until the time has expired for all claims of the higher class to be proved.¹⁴ All of the property, real and personal, of the deceased may be made available for the payment of debts, for the first duty of the administration tribunal is to see that honest creditors are satisfied.¹⁵

§ 207. Order in which assets are marshalled for payment of demands

Under the common law where no different order is prescribed in the will, the assets of the deceased, for the purpose of paying the debts of the estate, will be marshalled and the debts paid out of them in the following order:

First: The personal estate, not specifically bequeathed, or expressly or by implication excepted.

Second: Lands expressly devised for the payment of debts.

Third: Lands descended to the heir.

Fourth: Lands devised.¹⁶

¹⁴ Churchill v. Bee, 66 Ga. 621.

Executor cannot pay legacies to the injury of creditors without incurring personal liability. Whitfield v. Wolff, 51 Ala. 206; Handley v. Hefin, 84 Ala. 603, 4 South. 725; Williamson v. Mason, 18 Ala. 87.

Legacies, though required to be paid out of first money received by executors, are always postponed to funeral expenses and debts. James Estate, 65 Cal. 25, 2 Pac. 494.

¹⁵ Hammond v. Hammond, 135 Ga. 768, 70 S. E. 588.

¹⁶ Chancellor Kent in Livingston v. Newkirk, 3 Johns. Ch. (N. Y.) 312; Smith v. Kennard's Ex'r, 38 Ala. 695; Estate of Woodworth, 31 Cal. 595; Cooch's Ex'r. v. Cooch's Adm'r, 5 Houst. (Del.) 540, 1

The personal estate is to be first applied and exhausted, even for the payment of mortgage debts upon the real estate, if the personal debt of the testator, before resorting to the land.¹⁷ Specific legacies are, however, exonerated from debts as against descended lands or residuary devisees.¹⁸

The testator may vary this order by the terms of his will,¹⁹ and may charge his debts, in the first

Am. St. Rep. 161; *Morris v. Morris' Ex'r*, 4 *Houst. (Del.)* 414-426; *Lord v. Lord*, 22 *Conn.* 601; *Turner v. Laird*, 68 *Conn.* 198, 35 *Atl.* 1124; *Morgan v. Huggins (C. C.)* 48 *Fed.* 3.

¹⁷ *Buckley v. Seymour*, 74 *Conn.* 459, 51 *Atl.* 125, 92 *Am. St. Rep.* 229; *Jackson v. Bevins*, 74 *Conn.* 96, 49 *Atl.* 899; *Jacobs v. Button*, 79 *Conn.* 360, 65 *Atl.* 150; *Bishop v. Howarth*, 59 *Conn.* 455, 22 *Atl.* 432; *Turner v. Laird*, 68 *Conn.* 198, 35 *Atl.* 1124; *Estate of Thayer*, 142 *Cal.* 453, 76 *Pac.* 41; *Heydenfeldt's Estate*, 106 *Cal.* 434, 39 *Pac.* 788; *Phinney's Estate*, *Myr. Prob. (Cal.)* 239; *Estate of Woodworth*, 31 *Cal.* 595; *Knight v. Newkirk*, 92 *Mo. App.* 258; *Bondus v. Gorison's Heirs*, 37 *Tex.* 522; *Estate of De Bernal*, 165 *Cal.* 223, 131 *Pac.* 375; *Brown v. Baron*, 162 *Mass.* 56, 37 *N. E.* 772, 44 *Am. St. Rep.* 331; *Higbie v. Morris*, 53 *N. J. Eq.* 177, 32 *Atl.* 372.

¹⁸ *White v. Easters*, 38 *Ala.* 154; *Sanders v. Godley*, 36 *Ala.* 50; *Lightfoot v. Lightfoot's Ex'r*, 27 *Ala.* 351; *Carter v. Balfour's Adm'r*, 19 *Ala.* 814; *Pulliam v. Pulliam (C. C.)* 10 *Fed.* 53; *Moss v. Helsley*, 60 *Tex.* 426.

¹⁹ *Wright v. West's Ex'r*, 1 *Cranch, C. C.* 303, *Fed. Cas. No.* 18, 102; *McCulloch v. McLain's Ex'r*, 1 *Cranch, C. C.* 304, *Fed. Cas. No.* 8,739; *In re Estate of Sasse*, 93 *Neb.* 611, 141 *N. W.* 1026.

The English doctrine that if lands are devised "after payment of all debts" a trust or charge is created by implication is not recognized in Alabama. *Steele v. Steele*, 64 *Ala.* 438, 38 *Am. Rep.* 15; *Starke v. Wilson*, 65 *Ala.* 576; *Lewis v. Ford*, 67 *Ala.* 143.

As against the claims of creditors a testator cannot donate property, nor forgive a debt, nor forbear its collection so as to postpone or delay them beyond the time prescribed by the statute; but as regards the legatees themselves he has the right of absolute disposal—he may fix the time when legacies shall be payable or burden them

instance upon certain specific property, but not to the injury or prejudice of creditors.²⁰ Such special provisions may be enforced at the instance of creditors.²¹

A will may provide for the payment of a debt barred by the Statute of Limitations, but the effect of this is to create a new cause of action in the creditor against which the statute begins to run from the date of probate.²²

§ 208. Resort to land and contribution from legatees and devisees

Land may be sold to pay debts by order of the probate court when the personal estate is insufficient.²³ Legatees who have received their legacies may be required to refund for the payment of debts;²⁴ and when the property devised or be-

with charges, may release a debtor, or direct forbearance in the collection of the debt. *Howze v. Davis*, 76 Ala. 381.

²⁰ *Brant v. Brant*, 40 Mo. 266-278; *Ames v. Holderbaum* (C. C.) 44 Fed. 224; *Peter v. Beverly*, 10 Pet. 532, 9 L. Ed. 522; *Harkins v. Hughes*, 60 Ala. 316; *Maybury v. Grady*, 67 Ala. 147; *Hill v. Jones*, 65 Ala. 214; *Howze v. Davis*, 76 Ala. 381.

²¹ *McHardy v. McHardy's Ex'r*, 7 Fla. 301.

²² *Smith v. Gillette*, 59 Tex. 86; *Bullard v. Thompson*, 35 Tex. 313; *Campbell v. Shotwell*, 51 Tex. 27.

²³ *Trimble v. Rice*, 204 Fed. 407, 122 C. C. A. 658 (S. C.).

As to sale of homestead to pay debts. *Willier v. Cummings*, 91 Neb. 571, 136 N. W. 559, Ann. Cas. 1913D, 287; *Balance v. Gordon*, 247 Mo. 119, 152 S. W. 358; *Armor v. Lewis*, 252 Mo. 568, 161 S. W. 251.

²⁴ Creditor's bill will lie to reach property in the hands of a legatee or devisee. *Sanders v. Godley*, 23 Ala. 473; *Hecht v. Skaggs*, 53 Ark. 291, 13 S. W. 930, 22 Am. St. Rep. 192.

queathed to any person is taken for the payment of debts such devisee or legatee is entitled to contribution from the other devisees and legatees to re-establish the proper priority and proportion in which each should contribute.²⁵ If the estate is insolvent the creditor must take his proportional share of the assets, according to the class to which his debt belongs, unless he has a lien upon specific property. As to specific liens some statutes provide that no mortgage or deed of trust shall be foreclosed within a specified period after the death of the maker. By the common law rule, if an ancestor executed a bond or other covenant expressly binding his heirs, the heirs were liable on such covenant to the extent of lands which descended to them from such ancestor.²⁶ But the strict common law did not make a devisee liable upon the covenants of the devisor, and so one who took the lands by devise escaped this burden,²⁷ except where the same title passes by devise as would pass by descent.²⁸ This rule was in existence before the lands of the deceased were generally liable for his debts. Now by

²⁵ *Leyins v. Stevens*, 7 Mo. 90; *Moulton's Estate*, 48 Cal. 191; *Estate of De Bernal*, 165 Cal. 223, 131 Pac. 375.

Execution can never issue against the estate of a deceased person, except where the estate is withdrawn by the will from the jurisdiction of the probate court. *Lewis v. Nichols*, 38 Tex. 54.

²⁶ *Whittelsey v. Brohammer*, 31 Mo. 107; *Metcalf v. Larned*, 40 Mo. 572; *Walker v. Deaver*, 79 Mo. 664.

²⁷ *Lauer v. Griffin*, 67 Mo. 654; *Keen v. Watson*, 39 Mo. App. 165.

²⁸ *Hunt v. Lucas*, 68 Mo. App. 518.

statute lineal and collateral warranties are generally abolished and both heirs and devisees are liable upon the ancestor's covenants to the extent of the lands descended or devised to them.²⁹

§ 209. Legacy to creditor

It is stated as a general rule that a bequest to a creditor is presumed to be in satisfaction of the debt, unless this presumption is rebutted by the context of the will.³⁰ Such a legacy will usually put a creditor to his election whether to claim his legacy or stand on his legal rights as creditor.³¹ If he elects to accept the gift he takes it as legatee or devisee subject to the liability of the estate for the remaining debts.³² The bequest is not construed to take away any of his legal rights to enforce his claim but to give him in addition such portions as may not be legally enforceable.³³ The rule is regarded as somewhat of an anomaly and many courts look with disfavor upon it. Ordinarily a legacy, in the absence of evidence to the contrary is held to be in the nature of a bounty.

²⁹ Legatees do not incur a personal liability for testator's debts unless made a condition of the legacy. *Burton Mach. Co. v. Davies*, 205 Fed. 141, 123 C. C. A. 373.

³⁰ *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760; *Pitts v. Van Orden* (Tex. Civ. App.) 158 S. W. 1043.

A bequest may be made in lieu of a settlement of accounts between testator and legatee. *Bromley v. Atwood*, 79 Ark. 357, 96 S. W. 356.

³¹ *Bush v. Cunningham*, 37 Ala. 68.

³² *Jones v. Shomaker*, 41 Fla. 232, 26 South. 191.

³³ *Estate of Barclay*, 152 Cal. 753, 93 Pac. 1012.

The rule that a legacy to a creditor is presumed to be in payment of the debt, provided the debt was contracted before the making of the will, and that the legacy is as great as or greater than the debt, originated in early chancery cases where the obligation was not strictly enforceable, and therefore the testator was paying a debt which he could not be compelled to pay.³⁴ Courts have regarded it with so much dissatisfaction that they have seized upon the slightest circumstances to take cases out of the rule.³⁵

³⁴ Talbott v. Duke of Shrewsbury, Prec. Ch. 394; Fowler v. Fowler, 3 P. Wms. *353.

³⁵ Eaton v. Benton, 2 Hill (N. Y.) 576; Richardson v. Greese, 3 Atk. *65; German v. German, 7 Cold. (Tenn.) 180; Sheldon v. Sheldon, 133 N. Y. 1, 30 N. E. 730; Williams v. Crary, 4 Wend. (N. Y.) 443; Thompson v. Wilson, 82 Ill. App. 29.

Louisiana has abolished it by statute. Succession of Jackson, 47 La. Ann. 1089, 17 South. 598.

CHAPTER XIII

DISTRIBUTION

- § 210. Distribution is of statutory origin.
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§ 210. Distribution is of statutory origin

Distribution of the personal estate of a deceased person is the creature of statute law. The common law did not provide for distribution, but left the surplus of the personal effects, if any, after the payment of the debts, in the hands of the executor or administrator.¹ This seems to have grown out of the fact that the executor was not entitled to any

¹ Pratt v. Wright, 5 Mo. 192-200.

fees for his services, and took the surplus as a sort of compensation; hence if he were given a specific legacy by the will, such gift rebutted the presumption that he was entitled to the surplus.² The feudal law designated the heirs of the freehold lands; and it was not until long subsequent that statutes created the class known as next of kin, to which was to be distributed the surplus of the personal estate. The latter, springing from a more modern spirit of public policy, embraced a much wider group of persons than the old feudal heirs-at-law. The American statutes of descent and distribution have transcended the narrow confines of the feudal law, and distribute the real and personal estate to the same group of heirs.

Distribution of the personal estate is according to the law of the testator's domicile.³ This rule is subject to the limitation that the disposition does not violate the statute law or the public policy of the state or country where it is situated,⁴ and yields to a plain indication in the will that the testator had in mind the law of another jurisdiction where the property was situated.⁵

² 2 Blackstone Com. p. 515.

³ In *re Estate of Riesenbergh*, 116 Mo. App. 308, 90 S. W. 1170; *Ennis v. Smith*, 14 How. 400, 14 L. Ed. 472; *Higgins v. Eaton*, 183 Fed. 388, 105 C. C. A. 608; *Id.* (C. C.) 188 Fed. 938.

⁴ *Estate of Lathrop*, 165 Cal. 243, 131 Pac. 752; *Whitney v. Dodge*, 105 Cal. 197, 38 Pac. 636; *Estate of Apple*, 66 Cal. 434, 6 Pac. 7; *Mahorner v. Hooe*, 9 Smedes & M. (Miss.) 247, 48 Am. Dec. 706.

⁵ *Lanius v. Fletcher*, 100 Tex. 550, 101 S. W. 1076; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 41 Atl. 252.

§ 211. When distribution may be made

Before any distribution is made the rights of creditors must be protected, and to this end the statutes provide that executors and administrators shall not be compelled to make distribution or pay legacies until one year from the date of the letters,⁶ nor shall they be compelled to pay during the second year unless security be given by the legatee or distributee to refund his due proportion of any debt which may be afterward established.⁷ In some states they are not compelled to make distribution within the three years allowed for administering the estate without a specific order of the court and bond given by the legatee or distributee to refund, if necessary for the payment of debts.

When the devisee or legatee once gets title he may sue for the property in his own name, even

⁶ *State Bank v. Williams*, 6 Ark. 156; *William's Estate*, 112 Cal. 521, 44 Pac. 808, 53 Am. St. Rep. 224; *Bartlett v. Slater*, 53 Conn. 102, 22 Atl. 678, 55 Am. Rep. 73; *Beardsley v. Bridgeport P. O. Asylum*, 76 Conn. 560, 57 Atl. 165; *Jacobs v. Bradley*, 36 Conn. 370; *Beardsley v. Selectmen*, 53 Conn. 491, 3 Atl. 557, 55 Am. Rep. 152; *Lepard v. Skinner*, 58 Conn. 330, 20 Atl. 427; *In re Estate of Sears*, 18 Utah, 193, 55 Pac. 83.

Although they vest as of the death of the testator and not of the time of distribution. *Estate of Pearson*, 113 Cal. 577, 45 Pac. 849, 1062.

⁷ An heir or devisee of an estate cannot maintain an action for distribution or partition until debts, allowances and expenses against the estate have been paid or provided for unless he gives a bond with approved sureties to pay the same. *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065.

though the title was obtained under a foreign probate.⁸

In some states by statute there can be no partition of real estate contrary to the terms of the will.⁹

§ 212. When legacies bear interest

The rule is that general legacies begin to bear interest one year after the death of the testator and continue to draw interest until paid. The testator may, however, provide otherwise by his will.¹⁰

The following legacies are, in accordance with the presumed intention of the testator, entitled to interest or income from the death of the testator:

⁸ *Clarke v. Sinks*, 144 Mo. 448, 46 S. W. 199.

⁹ *Thompson v. McClernon*, 142 Mo. App. 429, 127 S. W. 384; *Stewart v. Jones*, 219 Mo. 614, 118 S. W. 1, 131 Am. St. Rep. 595; *Whitelaw v. Rodney*, 212 Mo. 540, 111 S. W. 560; *Moss v. Ashbrooks*, 20 Ark. 128; *Hawkins v. Greene*, 23 Ark. 89.

¹⁰ *Morton v. Hatch*, 54 Mo. 408; *Custis v. Potter's Adm'r*, 1 Houst. (Del.) 382, 68 Am. Dec. 422; *George v. McMullin*, 3 Del. Ch. 269; *Redfield v. Marvin*, 78 Conn. 704, 63 Atl. 120; *Colt v. Colt*, 33 Conn. 270; *Estate of Brown*, 143 Cal. 450, 77 Pac. 160; *James' Estate*, 65 Cal. 25, 2 Pac. 494; *Hallett v. Allen*, 13 Ala. 554; *Atkins v. Guice*, 21 Ark. 164; *Bowdre v. Jones*, 34 Ga. 399; *Way v. Priest*, 87 Mo. 180; *Id.*, 13 Mo. App. 555; *Catron's Estate*, 82 Mo. App. 416; *Lewis v. Barkley*, 91 Neb. 127, 135 N. W. 379.

Rents accruing subsequent to the death of testator on lands devised pass to the tenant for life. *Woodruff v. Hinson*, 68 Ala. 368.

A refusal to pay a legacy is not willful and without reasonable cause so as to entitle legatee to interest where he claims a larger sum than entitled to, and on suit, is allowed only half of the amount claimed. *Dickey v. Dickey*, 94 Fed. 231, 36 C. C. A. 211.

Executor cannot pay the legacy sooner than the time fixed by the will. *Montgomery v. Robertson*, 57 Ga. 258.

1. Specific legacies.¹¹
2. Residuary legacies of the whole or an aliquot part of the estate.¹²
3. Legacies to infant children or other dependents for their support.¹³
4. Legacies for life or a term of years.¹⁴

§ 213. Distribution by agreement

No administration of the personal estate of an intestate is necessary when there are no creditors. The heirs in such case may divide the assets of the estate among themselves, in kind or otherwise, by mutual agreement.¹⁵ So, legatees may divide the estate by agreement, and if they are of full age the agreement will bind them, though the division is not in accordance with the will.¹⁶ So an executor

¹¹ Pulliam v. Pulliam (C. C.) 10 Fed. 53; Myers' Ex'rs v. Myers, 33 Ala. 85; Nash v. Ober, 2 App. D. C. 304; Beal v. Crafton, 5 Ga. 301; In re Estate of Pope, 83 Neb. 723, 120 N. W. 191.

¹² Adams v. Spalding, 12 Conn. 360; Bancroft v. Security Co., 74 Conn. 218, 50 Atl. 735; Lawrence v. Security Co., 56 Conn. 423-439, 15 Atl. 406, 1 L. R. A. 342; Bishop v. Bishop, 81 Conn. 509, 71 Atl. 583.

¹³ Flinn v. Flinn, 4 Del. Ch. 44; Crew v. Pratt, 119 Cal. 131, 51 Pac. 44; Mackay v. Mackay, 107 Cal. 303, 40 Pac. 558.

¹⁴ Webb v. Lines, 77 Conn. 51, 58 Atl. 227.

¹⁵ Brown v. Baxter, 77 Kan. 97, 94 Pac. 155, 574; Foote v. Foote, 61 Mich. 181, 28 N. W. 90; Walworth v. Abel, 52 Pa. 370; Needham v. Gillett, 39 Mich. 574; Waterhouse v. Churchill, 30 Colo. 415, 70 Pac. 678; McGhee v. Alexander, 104 Ala. 116, 16 South. 148; Cox v. Yeazel, 49 Neb. 343, 68 N. W. 485; Hogue v. Sims, 9 Tex. 546; Griesel v. Jones, 123 Mo. App. 45-55, 99 S. W. 769.

¹⁶ Hatcher v. Cade, 55 Ga. 359; McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997; White v. Rowland, 67 Ga. 546, 44 Am. Rep. 731;

may settle with the heirs or legatees out of court, but the courts will scrutinize very carefully such a settlement.¹⁷ And a receipt by a legatee to an executor is no bar to an examination of his accounts.¹⁸

§ 214. Assent of executor

As a result of the doctrine of the common law that the title to the personal estate vested in the executor, his assent was necessary to vest the legal title to the several legacies in the legatees. This doctrine still obtains under the American statutes, for the protection of creditors and the payment of expenses of administration. Legatees and distributees cannot sue, therefore, to recover personal prop-

Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81; *Swift v. Swift*, 129 Ga. 848, 60 S. E. 182; *Watkins v. Gilmore*, 130 Ga. 797, 62 S. E. 32; *Hill v. Arnold*, 79 Ga. 367, 4 S. E. 751; *Crawley v. Blackman*, 81 Ga. 775, 8 S. E. 533; *Hill v. Hill*, 81 Ga. 516, 8 S. E. 879; *Napier v. Anderson*, 95 Ga. 618, 23 S. E. 191; *Thorington v. Hall*, 111 Ala. 323, 21 South. 335, 56 Am. St. Rep. 54; *Treat v. Treat*, 35 Conn. 210; *Walton v. Ambler*, 29 Neb. 626, 45 N. W. 931.

But neither by statutory partition nor by agreement can the rights of those not parties be affected. *Watkins v. Gilmore*, 130 Ga. 797, 62 S. E. 32.

Contract between heirs apparent before death of testator as to distribution sustained as not against public policy. *Spangenberg v. Spangenberg*, 19 Cal. App. 439, 126 Pac. 379.

¹⁷ *Balfe v. Tilton* (D. C.) 198 Fed. 704.

¹⁸ *Wellborn v. Rogers*, 24 Ga. 558.

There is no law against the executor marrying the widow and buying in the shares of the other legatees and thus becoming owner of the estate. *New v. Potts*, 55 Ga. 420, 427.

erty except through the legal representative of the estate.¹⁹

In many cases the formal assent of the executor is all that is necessary to enable the legatee to take possession of his legacy.²⁰ The executor may not, under pretense of assent, enlarge or abridge the title of the legatee.²¹ The assent of the executor need not be express. It may be inferred from continued possession by the legatee,²² lapse of time,²³ and other circumstances.²⁴

¹⁹ *Murphy v. Pound*, 12 Ga. 278; *Shaddix v. Watson*, 130 Ga. 764, 61 S. E. 828.

²⁰ *Johnson v. Conn. Bank*, 21 Conn. 156; *Refeld v. Bellette*, 14 Ark. 148; *Carter v. Cantrell*, 16 Ark. 154; *Crow v. Powers*, 19 Ark. 424; *Bothwell v. Dobbs*, 59 Ga. 787.

A legatee who obtains possession without the assent of the executor may be compelled to restore the property. *Upchurch v. Norsworthy*, 12 Ala. 532.

No such assent by executor as will prevent due administration of estate for payment of debts. *Harris v. Cole*, 114 Ga. 295, 40 S. E. 271.

Assent is necessary even to a specific legacy. *Ross v. Davis*, 17 Ark. 113.

²¹ *Mordecai v. Beal*, 8 Port. (Ala.) 529.

²² *Parker v. Chambers*, 24 Ga. 518; *Thaggard v. Crawford*, 112 Ga. 326, 37 S. E. 367; *Vaughn v. Howard*, 75 Ga. 285.

²³ *Coleman v. Lane*, 26 Ga. 515; *Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196; *Phillips v. Smith*, 119 Ga. 556, 46 S. E. 640; *Brown v. Hooks*, 133 Ga. 345, 65 S. E. 780; *Bufford v. Holliman*, 10 Tex. 560-573, 60 Am. Dec. 223.

²⁴ *Schley v. Collis (C. C.)* 47 Fed. 250, 13 L. R. A. 567; *George v. Goldsby*, 23 Ala. 326; *Murphree v. Singleton*, 37 Ala. 412; *Whorton v. Moragne*, 62 Ala. 201; *Walker v. Walker's Distributees*, 26 Ala. 262; *Camp v. Coleman*, 36 Ala. 163; *Cox's Adm'r v. McKinney*, 32 Ala. 461.

The assent of the executor to an estate for life is an assent to the remainder. *Hemphill v. Moody*, 64 Ala. 468; *Harkins v. Hughes*, 60

The power of the executor over real estate is an enlargement of his powers by statute in certain states, for at common law he did not enter into possession of the real estate.²⁵ In some states possession of all of the property of the deceased, both real and personal, is committed to the executor or administrator until the administration is completed.²⁶ And in such case his assent is necessary to devisees as well as legacies. A legacy is not subject to be seized and sold for the debts of the legatee until by assent of the executor title has passed to the legatee.²⁷

Ala. 316; *Bethea's Ex'r v. Smith*, 40 Ala. 415; *Nixon v. Robbins*, 24 Ala. 663; *Hunter v. Green*, 22 Ala. 329; *Thrasher v. Ingram*, 32 Ala. 645; *Gibson v. Land*, 27 Ala. 117; *Toombs v. Spratlin*, 127 Ga. 766, 57 S. E. 59; *Bufford v. Holliman*, 10 Tex. 560, 60 Am. Dec. 223.

²⁵ *Beckwith v. Cowles*, 85 Conn. 567, 83 Atl. 1113; *Mohr v. Dillon*, 80 Ga. 572, 5 S. E. 770.

²⁶ *Bilger v. Nunan*, 199 Fed. 549, 118 C. C. A. 23 (Or.); *Northrop v. Columbian Lbr. Co.*, 186 Fed. 770, 108 C. C. A. 640 (Ga.); *Meeks v. Hahn*, 20 Cal. 620; *Meeks v. Kirby*, 47 Cal. 168; *McCrea v. Haraszthy*, 51 Cal. 146.

²⁷ *Suggs v. Sapp*, 20 Ga. 100; *Clarke v. Harker*, 48 Ga. 596; *Harris v. Kittle*, 119 Ga. 29, 45 S. E. 729; *Reed v. Davis*, 95 Ga. 202, 22 S. E. 140.

PROCEEDINGS TO COMPEL DISTRIBUTION

§ 215. In probate court

By statute in most states it is now within the power of the probate court to order distribution when the time has arrived and the debts are paid.²⁸ The statutes usually fix the period at one year from the date of letters.²⁹ If the time has not then elapsed for the proving of claims against the estate or the payment of debts the legatees in seeking immediate distribution of their legacies may be compelled to give security to refund if necessary, for the payment of debts. The order of distribution may be enforced against the executor in the same manner as in demands against the estate.³⁰

The statutory proceedings in the probate court to compel distribution take the place largely of the assent of the executor. They do not necessarily indicate any hostility on his part, but are a very proper measure of protection both to him and to

²⁸ *Elliott v. Mayfield*, 3 Ala. 223; *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86; *Broadnax v. Sims*, 8 Ala. 497; *Hallett v. Allen*, 13 Ala. 554; *Sterns v. Weathers*, 30 Ala. 712; *Langston v. Marks*, 68 Ga. 435; *Allardyce v. Hambleton*, 96 Tex. 30, 70 S. W. 76.

Statute of limitation does not begin to run against a legatee until the right to demand payment accrues. *Layton v. State*, 4 Har. (Del.) 8.

Appeal from order of distribution of probate court. *In re Estate of Creighton*, 88 Neb. 107, 129 N. W. 181; *Id.*, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128.

²⁹ *Estate of Mayhew*, 4 Cal. App. 162, 87 Pac. 417; *Horton v. Averett*, 20 Ala. 719; *Walker v. Johnson*, 82 Ala. 347, 2 South. 744.

³⁰ *Morton v. State*, 25 Ark. 46.

creditors.³¹ An executor will be careful how he gives his assent to a legacy without the protection of a formal order of court. In some states after the assent of the executor is given he may be sued for the legacy in an action at law.³²

³¹ Petition for distribution is not an act of hostility to will.

Parties have a right to apply for distribution under any theory they entertain of the provisions of the will. *Estate of Spreckels*, 165 Cal. 597, 133 Pac. 289.

Estoppel of legatee assenting to acts of executor. *Nagle v. Von Rosenberg*, 55 Tex. Civ. App. 354, 119 S. W. 706.

Discretion in executors to pay legacies in money or property. *Jackson v. Phillips*, 57 Neb. 189, 77 N. W. 683.

Upon the probate of a will devising land to several persons their rights become fixed upon the probate of the will. A failure of executors to act, or ineffectual acts, would not affect the rights of such devisees. *Robertson v. Du Bose*, 76 Tex. 1, 13 S. W. 300.

The fact that a trustee, named in a will to make partition of an estate, has an interest as devisee in the estate would not of itself disqualify him from making the partition. *Davis v. Davis*, 51 Tex. Civ. App. 491, 112 S. W. 948.

Provision for distribution after an appraisement not properly carried out. *Farley v. Welch*, 237 Mo. 128, 140 S. W. 875.

³² *Pettigrew v. Pettigrew*, 1 Stew. (Ala.) 580; *Gause v. Hughes*, 9 Port. (Ala.) 552; *Cox's Adm'r v. McKinney*, 32 Ala. 461; *Bonner v. Young*, 68 Ala. 39; *Ramser v. Blair*, 123 Ala. 139, 26 South. 341.

§ 216. In equity

Equity originally had jurisdiction to compel an executor to give his assent to a legacy in a proper case.³³ This jurisdiction was founded upon the general character of the executor as trustee,³⁴ and is not entirely superseded by the statutory jurisdiction of courts of probate.³⁵

Equity may still be appealed to where the remedy in the probate court is not adequate.

While probate courts can order the distribution of funds belonging to the estate of the deceased and for that purpose determine the persons entitled to receive them, they cannot declare trusts in the estate distributed or impose conditions upon its use or disposition.³⁶

The executor or administrator cum testamento annexo represent the estate generally and those he

³³ *Bonner v. Young*, 68 Ala. 35; *Walker v. Caldwell*, 8 Del. Ch. 91, 67 Atl. 1085; *Childress v. Harrison*, 47 Ala. 556; *Lester v. Stephens*, 113 Ga. 495, 39 S. E. 109; *Johnson v. Porter*, 115 Ga. 401, 41 S. E. 644.

³⁴ *Leavens v. Butler*, 8 Port. (Ala.) 380; *Pearson v. Darrington*, 18 Ala. 348; *Horton v. Averett*, 20 Ala. 719; *Cloud v. Whiteman*, 2 Del. Ch. 23.

³⁵ *Huckabee v. Swoope*, 20 Ala. 491; *Vaughan v. Vaughan*, 30 Ala. 329; *Millsap v. Stanley*, 50 Ala. 319; *Johnston v. Duncan*, 67 Ga. 61; *Windsor v. Bell*, 61 Ga. 671; *Perea v. Barela*, 5 N. M. 458-472, 23 Pac. 766; *Bente v. Sullivan*, 52 Tex. Civ. App. 454, 115 S. W. 350. Assignment of legacy valid. *Estate of Rankin*, 164 Cal. 138, 127 Pac. 1034; *Walton v. Ambler*, 29 Neb. 626-644, 45 N. W. 931.

Suit by assignee of legatee against testamentary trustees for legacy. *McNeill v. Masterson*, 79 Tex. 670, 15 S. W. 673.

Unless executor is trustee, action against him for legacy is barred by statute of limitations. *Summerlin v. Dorsett*, 65 Ga. 397.

³⁶ *Bramell v. Cole*, 136 Mo. 201, 37 S. W. 924, 58 Am. St. Rep. 619; *Butler v. Lawson*, 72 Mo. 227; *Hunt v. Hunt*, 11 Nev. 442.

represents need not be made parties.³⁷ The flexible power of equity can adjust the relief to special cases. Thus the executor may be compelled to give security for a legacy payable in the future,³⁸ to exercise an option in deciding what property shall be applied to a legacy,³⁹ or in permitting the legatee to make a choice of property.⁴⁰ But the executor cannot be compelled to pay legacies contrary to the provisions of the will.⁴¹

§ 217. In federal courts

The federal courts, being possessed of plenary equity powers, have jurisdiction in suits for accounting and for the recovery of legacies. The jurisdiction must be founded upon diverse citizenship.⁴² The federal courts do not derive any juris-

³⁷ *Millsap v. Stanley*, 50 Ala. 319; *Colwell v. Miles*, 2 Del. Ch. 110; *Lee Co. v. Grace Hospital* (D. C.) 206 Fed. 994 (Mass.).

³⁸ *Randle v. Carter*, 62 Ala. 95.

³⁹ *Harper v. Bibb*, 47 Ala. 547.

⁴⁰ *Park v. Hardy*, 19 Ga. 127.

⁴¹ *Leavens v. Butler*, 8 Port. (Ala.) 380; *Casly v. Gilder*, 13 Ala. 322; *Hawkins v. Greene*, 23 Ark. 89; *Trotter v. Trotter*, 31 Ark. 145.

⁴² *Comstock v. Herron*, 55 Fed. 803, 5 C. C. A. 266; *Higgins v. Eaton*, 183 Fed. 388, 105 C. C. A. 608 (N. Y.); *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867; *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Lee Co. v. Grace Hospital* (D. C.) 206 Fed. 994 (Mass.); *Chase v. Wetzlar*, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990.

All legatees and distributees under the will are necessary parties in a suit in the federal court to set aside and declare invalid the residuary clause of the will. *Stevens v. Smith*, 126 Fed. 706, 61 C. C. A. 624.

diction from the ecclesiastical courts of England. They claim to be the successors of the high court of chancery of England. They do not therefore, take cognizance of any purely administrative proceedings in the settlement of decedents' estates, but confine themselves to actions that are equitable in character.⁴³ They will not probate a will, appoint an executor or disturb the possession by the probate courts of the state of the assets of the estate, except in cases where equity may properly adjudicate a right or supplement the action of the statutory probate court.⁴⁴ In some cases, it is true, very broad language has been used as to the extent to which the federal court may proceed but such lan-

⁴³ *Eddy v. Eddy*, 168 Fed. 590, 93 C. C. A. 586 (Mich.); *Hale v. Coffin* (C. C.) 114 Fed. 567.

Since the circuit court of the United States has no probate jurisdiction such court, in a suit by a legatee to enforce alleged obligations in the will, must interpret the executor's obligations on the assumption of the validity of those papers which have secured judicial recognition of the state court of probate jurisdiction and cannot consider conflicting probate proceedings in another state. *Higgins v. Eaton* (C. C.) 178 Fed. 153 (N. Y.).

⁴⁴ Under the decisions of the supreme court of the United States and of the supreme court of Ohio, a suit for a legacy in that state is of equitable cognizance. Pending the settlement of an estate in the probate court a citizen of another state who is a legatee under the will may maintain a suit in the federal court against the resident executor and the other legatees and heirs to recover such legacy. *Brendel v. Charich* (C. C.) 82 Fed. 262.

Where the probate courts of the state have taken jurisdiction for an accounting, the federal courts will not interfere. *Parkes v. Aldridge* (C. C.) 8 Fed. 220. See, also, *Chase v. Wetzlar*, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990.

guage will be found to be very much narrowed and restricted by an examination of the actual issue presented in the case.⁴⁵

§ 218. Marshalling assets for the payment of legacies

Courts of equity have the power of marshalling the assets for the payment of legacies and determining their relative standing in regard not only to abatement for the payment of debts but abatement for the payment of other legacies.⁴⁶ Specific devises and legacies are entitled as against the balance of the estate to exoneration from debts,⁴⁷ unless for encumbrances charged thereon.⁴⁸ But as

⁴⁵ For example the following:

"Upon the death of an owner his property is immediately impressed with a trust for his creditors, heirs and legatees. The federal courts have plenary jurisdiction derived from the high court of chancery in England at the suit of any proper heir, legatee or creditor to enforce this trust against any occupants, executors, administrators or parties into whose control any part of the estate may come. As this jurisdiction is not derived from the states, it may not be withdrawn or substantially impaired by probate or other laws of the states which grant to their courts exclusive jurisdiction over these subjects." *McClellan v. Carland*, 187 Fed. 915, 110 C. C. A. 49 (S. D.).

⁴⁶ *Radovich's Estate*, 54 Cal. 540; *Myr. Prob.* 118; *Gallagher v. Redmond*, 64 Tex. 622; *McNeill v. Masterson*, 79 Tex. 671, 15 S. W. 673; *In re Estate of Sears*, 18 Utah, 193, 55 Pac. 83.

⁴⁷ *Woodworth's Estate*, 31 Cal. 595; *Neistrath's Estate*, 66 Cal. 331, 5 Pac. 507; *Brainerd v. Cowdrey*, 16 Conn. 1; *White v. Easters*, 38 Ala. 154; *Warren v. Morris*, 4 Del. Ch. 289.

In case of doubt courts incline to regard legacy as general rather than specific, and to make it contribute to debts with other legacies. *Morton v. Murrell*, 68 Ga. 141.

⁴⁸ *Porter's Estate*, 138 Cal. 618, 72 Pac. 173.

between themselves they abate pro rata for debts.⁴⁹ The directions of the will may of course provide for the abatement of certain legacies in case of deficiency.⁵⁰ Specific legacies are also free from contribution to general legacies.⁵¹ Where the amount of a legacy is dependent upon the amount of the estate⁵² or is a fractional part of the estate, the net estate after deducting debts and charges is meant.⁵³

A legacy given to a wife in lieu of dower is deemed to be based on a valuable consideration and is not simply a gift. In case of ambiguity or conflicting provisions in the will it is entitled to preference over other gifts merely voluntary.⁵⁴ It does not abate with other legacies for the payment of debts but only after other assets have been exhausted.⁵⁵ But this doctrine does not extend to legacies to kindred or to quasi-creditors.⁵⁶

⁴⁹ *Kelly v. Richardson*, 100 Ala. 584, 13 South. 785.

⁵⁰ *Silsby v. Young*, 3 Cranch, 249, 2 L. Ed. 429.

⁵¹ *Neistrath's Estate*, 66 Cal. 330, 5 Pac. 507; *Estate of Painter*, 150 Cal. 498, 89 Pac. 98, 11 Ann. Cas. 760; *Case v. Case*, Kirb. (Conn.) 284; *Weed v. Hoge*, 85 Conn. 490, 83 Atl. 636, Ann. Cas. 1913C, 542.

⁵² *Dickey v. Dickey*, 94 Fed. 231, 36 C. C. A. 211.

⁵³ *Willcox v. Beecher*, 27 Conn. 134; *Bell v. Raymond*, 20 Conn. 341; *Blakeslee v. Pardee*, 76 Conn. 263, 56 Atl. 503.

⁵⁴ *Ballantine v. Ballantine* (C. C.) 152 Fed. 775; *Pulliam v. Pulliam* (C. C.) 10 Fed. 53; *Beeson v. Elliott*, 1 Del. Ch. 368.

⁵⁵ *Security Co. v. Bryant*, 52 Conn. 322, 52 Am. Rep. 599; *Lord v.*

⁵⁶ *Apple's Estate*, 66 Cal. 432, 6 Pac. 7; *Duffield v. Pike*, 71 Conn. 521, 42 Atl. 641.

§ 219. Legacies—Not generally chargeable upon land

Inasmuch as the personal estate is the natural and primary fund for the payment of debts and legacies the law conclusively presumes that a legacy is to be paid only out of the personalty, and if that be insufficient, the legacy is lost *pro tanto*, unless a contrary intention appears upon the face of the will either by express words or by fair and reasonable implication.⁵⁷

Lord, 23 Conn. 327; *Warren v. Morris*, 4 Del. Ch. 289; *Morris v. Warren*, 4 Houst. (Del.) 414-419.

Gift to wife in lieu of dower; wife afterward divorced for her misconduct and by statute forfeited her dower. Held: That the bequest was not conditioned on her remaining the wife of the testator. That the provision with regard to her not taking the bequest unless she relinquished her dower was not to be regarded as a condition that she should be entitled to dower and so be able to relinquish it. That the divorce did not as a matter of law make the bequest void or operated as a revocation of it. *Cord v. Alexander*, 48 Conn. 492, 40 Am. Rep. 187.

Dower, how computed in case of cumulative gift. *Goodwin v. Goodwin*, 33 Conn. 314.

⁵⁷ *Getchell v. Rust*, 8 Del. Ch. 284, 68 Atl. 404; *Canfield v. Bostwick*, 21 Conn. 553; *Miller v. Cooch*, 5 Del. Ch. 161; *Gilder v. Gilder*, 1 Del. Ch. 331; *Pitts v. Campbell*, 173 Ala. 604, 55 South. 500; *Power v. Davis*, 3 MacArthur (D. C.) 153; *Newsom v. Thornton*, 82 Ala. 402, 8 South. 261, 60 Am. Rep. 743; *Arnold v. Dean*, 61 Tex. 249; *Moerlein v. Heyer*, 100 Tex. 245, 97 S. W. 1040; *Mortgage Co. v. Boyd*, 92 Ala. 139, 9 South. 166; *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. 331; *McQueen v. Lilly*, 131 Mo. 9-18, 31 S. W. 1043; *Bevan v. Cooper*, 72 N. Y. 322.

Legacies chargeable upon real estate by implication. *Alfred v. Marks*, 49 Conn. 473; *Walker v. Atmore*, 50 Fed. 644, 1 C. C. A. 595; *O'Brien v. Dougherty*, 1 App. D. C. 148; *Rambo v. Rumer*, 4 Del. Ch.

Upon the proposal to charge the real estate with the payment of a pecuniary legacy all the presumptions are against it, and must be met and overcome. The burden rests upon the legatee seeking such relief to establish clearly his case and to find evidence to support it within the four corners of the will, considering all of the circumstances under which it was made.⁵⁸

There is little difficulty in those cases in which the will by express language requires the legacies to be paid out of the realty or out of certain realty. The difficulty arises where such a result is claimed by necessary implication from the language or provisions of the will. The cases in which such an implication may arise fall into the following groups:

§ 220. Legacies—When chargeable upon land

First: Where the testator gives several legacies and then without a special provision for paying them makes a general residuary disposition of the

9; *Crew v. Pratt*, 119 Cal. 131, 51 Pac. 44; *Gorman v. McDonnell*, 127 Ala. 549, 28 South. 964.

In the absence of statute the probate court has no power to order sale of the real estate to pay legacies on default of personal assets. *Goodwin v. Chaffee*, 4 Conn. 163.

⁵⁸ *Getchell v. Rust*, 8 Del. Ch. 284, 68 Atl. 404; *Gridley v. Andrews*, 8 Conn. 1; *Sistrunk v. Ware*, 69 Ala. 273; *Fauber v. Keim*, 85 Neb. 217, 122 N. W. 849.

Where the real estate is charged by the will with a special legacy this excludes the inference that it is charged generally with debts and legacies. *Arnold v. Dean*, 61 Tex. 249.

A legatee, by exercising an option to take testator's land at its appraised value under the will, held not to have obligated himself to

whole estate, blending the realty and personalty together in one fund.⁵⁹

The existence of a residuary clause is considered demonstrative evidence of an intention to charge legacies upon the land.⁶⁰ But even though the will charge the legacies upon the whole estate or direct that it be sold for their payment, it still remains true that the personal estate is the primary fund which must be first exhausted before resorting to the realty, unless the will changes this primary liability.⁶¹

Second: Where the testator has no personal property at the time of making the will, or his personal estate is too small to satisfy the legacies given by the will, he must be held to have intended to charge such legacies on the realty.⁶² But if there is sufficient personal estate at the time the will is made

pay other legatees more than the amount of the appraisement. *Fauber v. Keim*, 85 Neb. 217, 122 N. W. 849.

⁵⁹ *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819; *Readman v. Ferguson*, 13 App. D. C. 60; *Allegheny Nat'l Bank v. Hays* (C. C.) 12 Fed. 663; *Haldeman v. Openheimer*, 103 Tex. 275, 126 S. W. 566; *Herditchka v. Foss*, 2 Neb. (Unoff.) 428, 89 N. W. 300.

The mere fact that there is a residuary legatee does not make the *specific legacies* a lien on the estate in the hands of the executor. *Lewis v. Darling*, 16 How. 1, 14 L. Ed. 819, distinguished. *Sowles v. First Nat'l Bank* (C. C.) 54 Fed. 564.

⁶⁰ *Getchell v. Rust*, 8 Del. Ch. 284, 68 Atl. 404; *Estate of Ratto*, 149 Cal. 552, 86 Pac. 1107.

⁶¹ *U. S. v. Parker*, 2 MacArthur (D. C.) 444-450; *Hilton v. Hilton*, 2 MacArthur (D. C.) 70; *West v. Williams*, 15 Ark. 682.

⁶² *Gorman v. McDonnell*, 127 Ala. 549, 28 South. 964; *Hilford v. Way*, 1 Del. Ch. 342; *Cunningham v. Cunningham*, 72 Conn. 253, 43

such intent cannot be inferred,⁶³ even though the personal estate then existing be depleted before the death of the testator.⁶⁴

§ 221. Advancements—Hotchpot

There is a doctrine applied to the distribution of the estate of intestates, which bears the homely but expressive name of "hotchpot." It seems to be a survival of an old custom of London which was incorporated into the first English statute of distributions. It is to the effect that if money or property has been advanced by the parent to some of his children during his lifetime, the children so advanced, if they seek to share in the distribution of his estate must bring such advancements into hotchpot, that is, into the common fund, and be charged with the value thereof as so much received in settlement of the estate. It is not meant that the actual property, in specie, shall be returned to the estate for redistribution, but that its value will be charged against the share of the child ad-

Atl. 1046; *Smith v. Cairns*, 92 Tex. 667, 51 S. W. 498; *Green v. Byrne*, 46 Ark. 453-468; *Beck v. Kallmeyer*, 42 Mo. App. 563.

Even real estate specifically devised is charged with the payment of legacies of money for the payment of which the testatrix had no personal property at the time of making the will, if such intention can be gathered from the will itself and the surrounding circumstances. *Clotilde v. Lutz*, 157 Mo. 439, 57 S. W. 1018, 50 L. R. A. 847.

⁶³ *Parkes v. Aldridge* (C. C.) 8 Fed. 220; *Newsom v. Thornton*, 82 Ala. 402, 8 South. 261, 60 Am. Rep. 743; *Taylor v. Harwell*, 65 Ala. 1; *Steiner v. Steiner Land Co.*, 120 Ala. 128, 26 South. 494.

⁶⁴ *Swift v. Edson*, 5 Conn. 531; *Moerlein v. Heyer*, 100 Tex. 245, 97 S. W. 1040; *Ezell v. Head*, 99 Ga. 560, 27 S. E. 720.

vanced.⁶⁵ The children so advanced cannot be compelled to come into hotchpot, and if they refuse they will simply be disregarded in making an order for the distribution of the estate.⁶⁶ When money or property is given by a parent to a child, except as otherwise provided by statute, the presumption is that it is by way of advancement and not an absolute gift. This presumption, however, may always be fortified or rebutted by extraneous evidence.⁶⁷ Grandchildren may be charged with advancements made to their parents,⁶⁸ and the widow who takes a child's part is entitled to the benefit of having advancements charged against the child.⁶⁹ The probate court has power, in making an order of distribution, to take advancements into consideration, whether such advancements be of real or per-

⁶⁵ *Ray v. Loper*, 65 Mo. 470.

Held not an advancement. *Yates v. Burt*, 161 Mo. App. 267, 143 S. W. 73.

⁶⁶ *In re Estate of St. Vrain*, 1 Mo. App. 294.

In a suit by forced heirs, advancements must be taken into consideration. Advancements are computed at the value at the time advanced, without regard to subsequent increase or depreciation. *Scoby v. Sweatt*, 28 Tex. 713.

⁶⁷ *Ray v. Loper*, 65 Mo. 470; *Gunn v. Thruston*, 130 Mo. 345, 32 S. W. 654; *McDonald v. McDonald*, 86 Mo. App. 122.

Evidence of advancements. *Nelson v. Nelson*, 90 Mo. 460, 2 S. W. 413; *Strode v. Beall*, 105 Mo. App. 495, 79 S. W. 1019; *Vitt v. Clark*, 66 Mo. App. 214; *Brook v. Latimer*, 44 Kan. 431, 24 Pac. 946, 11 L. R. A. 805, 21 Am. St. Rep. 292; *Kramer v. Lyle* (D. C.) 197 Fed. (Ga.) 618.

⁶⁸ *Spradling v. Conway*, 51 Mo. 51; *In re Estate of Williams*, 62 Mo. App. 339.

⁶⁹ *McReynolds v. Gentry*, 14 Mo. 495.

sonal property.⁷⁰ Strictly speaking the doctrine of bringing advancements into hotchpot applies only in cases of intestacy.⁷¹ It has no application to wills except so far as the will provides for charging particular devisees with advancements.⁷²

The term "advancement" applies strictly to property received by the child during the life of the parent, but has been applied, in a figurative sense, to part payments of the distributive share received during settlement of the estate.⁷³

⁷⁰ *In re Estate of Elliott*, 98 Mo. 379, 11 S. W. 739; reversing s. c., 27 Mo. App. 218.

⁷¹ *Blanks v. Clark*, 68 Ark. 98, 56 S. W. 1063; *Marshall v. Rench*, 3 Del. Ch. 239; *Turpin v. Turpin*, 88 Mo. 337; *Parker v. Parker*, 10 Tex. 83-88.

⁷² *Haines v. Christie*, 28 Colo. 502, 66 Pac. 883; *Security Co. v. Brinley*, 49 Conn. 48; *Blackstone's Appeal*, 64 Conn. 414, 30 Atl. 48; *Ketchum v. Corse*, 65 Conn. 85, 31 Atl. 486; *Cochran v. Cochran's Ex'r*, 3 Pennewill, 524, 52 Atl. 346; *Walker v. Williamson*, 25 Ga. 549; *Nelson v. Wyan*, 21 Mo. 347; *Maguire v. Moore*, 108 Mo. 277, 18 S. W. 897; *Tompkins v. Lear*, 146 Mo. App. 642, 124 S. W. 592; *Clements v. Maury*, 50 Tex. Civ. App. 158, 110 S. W. 185; *Meeks v. Lafley*, 99 Ga. 170, 25 S. E. 92; *McNeil v. Hammond*, 87 Ga. 618, 13 S. E. 640; *In re Weber*, 15 Cal. App. 224, 114 Pac. 597.

Will may provide that advancements shall not be charged against children. *Adams v. Cowen*, 177 U. S. 471, 20 Sup. Ct. 668, 44 L. Ed. 851.

Where the will refers to testator's book of charges and advancements the statement of account is conclusive on the children and cannot be disputed except by evidence of payments of later date than shown on book. *Tompkins v. Lear*, 146 Mo. App. 642, 124 S. W. 592.

⁷³ *Hines v. Hines*, 243 Mo. 480, 147 S. W. 774; *Goodnough v. Webber*, 75 Kan. 209, 88 Pac. 879.

§ 222. Equitable conversion

It is a well settled rule in equity that land directed to be converted into money or money into land will be considered as that species of property into which it is directed to be converted, and that the beneficiaries take as legatees or devisees according to the nature or quality of the property in its converted state or condition.⁷⁴

Equitable conversion results from the existence of a power to convert realty into personalty, or personalty into realty, which has not been exercised.

⁷⁴ Estate of Journey, 7 Del. Ch. 1, 44 Atl. 795; Harker v. Reilly, 4 Del. Ch. 72; In re Stevenson, 2 Del. Ch. 197; Loftis v. Glass, 15 Ark. 680; Weed v. Hoge, 85 Conn. 490, 83 Atl. 636, Ann. Cas. 1913C, 542; Ritch v. Talbot, 74 Conn. 137, 50 Atl. 42; Handley v. Palmer (C. C.) 91 Fed. 948; De Vaughn v. McLeroy, 82 Ga. 687, 10 S. E. 211.

Where the testator in his lifetime has sold land and brought suit for the unpaid purchase money, but dies before recovery, the claim is personal property and not real estate, and the devisee of the realty has no option to rescind the contract and claim the land. He stands in the shoes of the testator. Summerhill v. Hanner, 72 Tex. 224, 9 S. W. 881.

Equitable conversion by will. Clarke v. Clarke, 46 S. C. 230, 24 S. E. 202, 57 Am. St. Rep. 675; Farmer v. Spell, 11 Rich. Eq. 547; Perry v. Logan, 5 Rich. Eq. 202; Moore v. Davidson, 22 S. C. 94; Jaudon v. Ducker, 27 S. C. 295, 3 S. E. 465; Penfield v. Tower, 1 N. D. 216, 46 N. W. 413; Dodge v. Williams, 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; Chandler's Appeal, 34 Wis. 505; Dodge v. Pond, 23 N. Y. 69; Becker v. Chester, 115 Wis. 116, 91 N. W. 87, 650; Starr v. Willoughby, 218 Ill. 485, 75 N. E. 1029, 2 L. R. A. (N. S.) 623; In re Estate of Willits, 88 Neb. 805, 130 N. W. 757.

In case of mandatory conversion heirs have no interest in realty as such. Chick v. Ives, 2 Neb. (Unoff.) 879, 90 N. W. 751; Knauf v. Mack, 93 Neb. 524, 141 N. W. 199.

Not an equitable conversion. Lambden v. West, 7 Del. Ch. 266, 44 Atl. 797.

There must be both the grant of a power and the imposition of a duty to make use of it.⁷⁵ The conversion is assumed to have taken place as of the date of the testator's death, under the maxim that "Equity regards that as done which ought to be done,"⁷⁶ subject to reconversion at the option of those for whose benefit it is to be done.⁷⁷ Such conversion is *pro tanto* only, for the purposes of the will,⁷⁸ and is subordinate to legal and statutory

⁷⁵ *Clark's Appeal*, 70 Conn. 195, 39 Atl. 155; *Duffield v. Pike*, 71 Conn. 521, 42 Atl. 641.

⁷⁶ *Allen v. Watts*, 98 Ala. 384, 11 South. 646; *Miller v. Payne*, 28 App. D. C. 396; *Vogt v. Vogt*, 26 App. D. C. 46; *Iglehart v. Iglehart*, 26 App. D. C. 209, 6 Ann. Cas. 732; *Williams v. Williams*, 145 Mo. App. 382-387, 129 S. W. 454; *Morris v. Stephenson*, 128 Mo. App. 338, 107 S. W. 449; *Chick v. Ives*, 2 Neb. (Unoff.) 879, 90 N. W. 751.

⁷⁷ *Cropley v. Cooper*, 7 D. C. 226; *Swann v. Garrett*, 71 Ga. 566; *De Vaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211; *Nall v. Nall*, 243 Mo. 247, 147 S. W. 1006; *In re O'Bannon Estate*, 142 Mo. App. 268, 126 S. W. 215.

If legatees are all *sui juris* they have the right to elect to reconvert the property to real estate. *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320; *Greenland v. Waddell*, 116 N. Y. 234, 22 N. E. 367, 15 Am. St. Rep. 400; *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. 495; *Lash v. Lash*, 209 Ill. 595, 70 N. E. 1049; *Boland v. Tiernay*, 118 Iowa, 59, 91 N. W. 836; *Bank of Ukiah v. Rice*, 143 Cal. 265, 76 Pac. 1020, 101 Am. St. Rep. 118; *Craig v. Leslie*, 3 Wheat. 563, 4 L. Ed. 460.

Right of devisees to reconvert real estate directed to be sold and thus avoid sale as laid down in *Williams v. Lobban*, 206 Mo. 309, does not apply unless the remaindermen and their interests are all definite. *Stewart v. Jones*, 219 Mo. 614-642, 118 S. W. 1, 131 Am. St. Rep. 595.

⁷⁸ *Johnson v. Holifield*, 82 Ala. 123, 2 South. 753; *Allen v. Watts*, 98 Ala. 384, 11 South. 646; *Hilton v. Hilton*, 2 MacArthur (D. C.) 70.

Where it is clear that the testator intended all his estate to be

rights, such as selection of homestead out of the lands, etc.⁷⁹ Equitable conversion, being the performance of the direction or intention of the owner of the title, applies only to the property of a testate: the law fixes the character of the property of an intestate.⁸⁰

converted into money and then distributed among his legatees in equity the real estate will be considered as money for the purposes of the will, and reconverted into land at the election of the legatees. A constructive or equitable conversion is as of the date of the will or death of the testator, the actual conversion as of the date of the sale of the real estate, and the reconversion may take place at any time between constructive and actual conversion. To constitute reconversion there must be an election by the legatees if they are adults, or by a court of equity if they are infants. *Griffith v. Witten*, 252 Mo. 627, 161 S. W. 708; *Coil v. Ins. Co.*, 169 Mo. App. 634, 155 S. W. 872.

⁷⁹ *In re Lahiff*, 86 Cal. 151, 24 Pac. 850.

The theory of equitable conversion is a fiction invented to promote justice by carrying out the purpose of the testator, and it should be applied with that end in view. Held, that land devised to be sold and distributed was subject to judgment lien against one of the distributees. *Bank v. Murray*, 86 Kan. 766, 121 Pac. 1117, 39 L. R. A. (N. S.) 817; *Ward v. Benner*, 89 Kan. 369, 131 Pac. 609; *Smith v. Hensen*, 89 Kan. 792, 132 Pac. 997.

Where land is directed to be sold for distribution after the death of a life tenant there is no equitable conversion at the death of testator. *Williams v. Lobban*, 206 Mo. 399, 104 S. W. 58.

⁸⁰ *Shivers v. Latimer*, 20 Ga. 737.

§ 223. Directions for continuing a business

Attempts on the part of a testator to provide in his will for a continuation of his business after his death have presented an anomalous situation difficult for the courts to deal with. Yet they have endeavored to do so and to carry out the intentions of the testator as fully as possible.⁸¹ Here again, the inevitable confusion occurs where a dead man attempts, under the liberality extended to testators, to project his personality beyond the grave and retain control of his former property. What is the status of the property? In whom is the title vested? What are the rights and powers of the person in possession or control of it? It is said that a partnership may be continued by will,⁸² but neither a partnership nor any other form of agency can exist in any proper sense, when the principal is dead.

The direction to continue a business is really reducible to a form of testamentary trust. The powers of the trustee, whether designated as partner, executor, manager or otherwise, the amount of the property devoted to the trust, the extent to

⁸¹ *Thorn v. De Breteuil*, 86 App. Div. 410, 83 N. Y. Supp. 849; *In re Hyde*, 47 Kan. 281, 27 Pac. 1001; *Blaker v. Morse*, 60 Kan. 24, 55 Pac. 274; *Burwell v. Cawood*, 2 How. 560, 11 L. Ed. 378; *Fridenburg v. Wilson*, 20 Fla. 359; *Woodman v. Davison*, 85 Kan. 713, 118 Pac. 1066; *Wall v. Bissell*, 125 U. S. 382, 8 Sup. Ct. 979, 31 L. Ed. 772.

⁸² *Mason v. Slevin*, 1 White & W. Civ. Cas. Ct. App. § 11; *Wilson v. Meyer*, 23 Utah, 529, 65 Pac. 488; *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347; *Steiner v. Steiner Co.*, 120 Ala. 128, 26 South. 494.

which liabilities may be incurred in conducting the business, and the portion of the estate primarily liable for such debts must be worked out under the general rules pertaining to trusts. The first and principal rule is that the powers of a trustee must be found expressed or necessarily implied in the trust instrument—the will.⁸³

§ 224. Advantages of incorporation

Under the laws of most states it is perfectly possible to incorporate an estate, after the death of the testator.⁸⁴ While this cannot be done by those who exercise limited powers like executors or trustees, it may always be done by the heirs, distributees and legatees if *sui juris*. It is a very useful and very effective plan of preventing loss or sacrifice of the estate by dismemberment and sale for distribution, and of preserving a business which has an added value as a going concern. The undivided interest of legatees or heirs in a mercantile business or in

⁸³ *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. 347; *Palmer v. Moore*, 82 Ga. 177, 8 S. E. 180, 14 Am. St. Rep. 147.

If property included in a mercantile business is bequeathed on condition that the legatee assume all liabilities of the business and the property proves insufficient for the liabilities the balance is a general debt of the estate. *Richardson v. Carroll*, 100 Ala. 584, 13 South. 785.

An independent executor in Texas has power, without express authority of will, to continue mercantile business of testator, if he determine that the best interest of the estate require it and is not liable for losses resulting therefrom if he exercised reasonable discretion in discharging the trust. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

⁸⁴ *Burnes v. Burnes*, 137 Fed. 781, 70 C. C. A. 357.

real estate which is not readily convertible or any other property which it is desired to preserve from forced sale may be conveyed or released to a corporation in exchange for stock based upon a value fixed by appraisement or by agreement. Thereafter the business can be carried on without personal risk or liability and without involving the remainder of the estate. Of course it is always possible for a testator to incorporate his business or estate in his lifetime and distribute by will the shares in such proportions and under such conditions as he thinks proper.

§ 225. Testamentary guardians

The power of a testator to appoint a guardian of the persons and property of his children is founded upon the Statute 12 Car. II, c. 24, § 8. That statute conferred the right only upon the father,⁸⁵ but American statutes have broadened the right considerably,⁸⁶ and have provided a measure of control by the probate courts.⁸⁷

⁸⁵ *Hernandez v. Thomas*, 50 Fla. 522, 39 South. 641, 2 L. R. A. (N. S.) 203, 111 Am. St. Rep. 137, 7 Ann. Cas. 446.

⁸⁶ *Churchill v. Jackson*, 132 Ga. 666, 64 S. E. 691, 49 L. R. A. (N. S.) 875, Ann. Cas. 1913E, 1203; *Southern Marble Co. v. Stegall*, 90 Ga. 236, 15 S. E. 806; *McKinney v. Noble*, 37 Tex. 731; *Id.*, 38 Tex. 195; *Buckley's Adm'r v. Howard*, 35 Tex. 566; *Sutton v. Harvey*, 24 Tex. Civ. App. 26, 57 S. W. 879; *Potts v. Terry*, 8 Tex. Civ. App. 394, 28 S. W. 122.

⁸⁷ The statute provides that if the testamentary guardian fails to notify the probate court of his acceptance of the guardianship of the minor children and to give bond within six months after the probate

§ 226. The decree of distribution

It has been said that a proceeding in the probate court to secure a distribution of the estate of a decedent is essentially one in rem in which the parties interested may be bound by constructive notice, and that such notice if reasonable constitutes due process of law against all parties without regard to their place of residence.⁸⁸ There is room for some difference of opinion on this subject of the binding effect of a decree of distribution, as the equitable proceeding for distribution was certainly not a proceeding in rem. Equity acts in personam. However, there is no doubt that a decree of distribution is *res adjudicata* and binding upon all parties represented before the court.⁸⁹ While the decree is not an original source of title but is based on the will,⁹⁰ yet the will is merged in and superseded by the decree, which then prevails as to the rights of

of the will the court may appoint a guardian as if no appointment had been made by the testator. *In re Breck*, 252 Mo. 302, 158 S. W. 843.

⁸⁸ *Goodrich v. Ferris* (C. C.) 145 Fed. 844; *In re Estate of Creighton*, 91 Neb. 654, 136 N. W. 1001, Ann. Cas. 1913D, 128; *In re Estate of Sweeney*, 94 Neb. 834, 144 N. W. 902.

⁸⁹ *Estate of Spreckels*, 165 Cal. 597, 133 Pac. 289.

A decree of distribution under a will is not binding on a person not in esse and he may collaterally attack it in equity. *In re De Leon*, 102 Cal. 537, 36 Pac. 864.

When interest of legatees is finally determined their title relates back to death of testator, and they are entitled to income accruing during litigation or delay in settlement of estate. *Guthrie v. Wheeler*, 51 Conn. 207.

⁹⁰ *Gerard v. Ives*, 78 Conn. 485, 62 Atl. 607.

the distributees actually before the court.⁹¹ The decree is conclusive unless set aside by direct proceedings for review.⁹² The decree may be adapted to carrying out the purposes and directions of the will,⁹³ and if the estate cannot be fully distributed, because the executors are charged with some continuing duty, as the payment of annuities, the keeping in repair of a homestead, etc., provision may be made for the retention of a sufficient fund for that purpose.⁹⁴

It is the duty of the court upon distribution to give effect to the legal devises and bequests of the testator and it cannot, even with the consent of the parties, declare valid trusts which are opposed to the express mandate and policy of the law.⁹⁵

Whatever may be the effect of the decree upon the rights of those claiming *under* the will,⁹⁶ it has no effect upon those claiming *adversely* to the will.

⁹¹ *Keating v. Smith*, 154 Cal. 186, 97 Pac. 300; *Hardy v. Mayhew*, 158 Cal. 95, 100 Pac. 113, 139 Am. St. Rep. 73; *Estate of Fitzgerald*, 161 Cal. 319, 119 Pac. 96, 49 L. R. A. (N. S.) 615.

⁹² *Goodrich v. Ferris* (C. C.) 145 Fed. 844 (Cal.); *State v. Blake*, 69 Conn. 64, 36 Atl. 1019; *Jewell v. Pierce*, 120 Cal. 82, 52 Pac. 132; *Burton M. Co. v. Davies*, 205 Fed. 141, 123 C. C. A. 373.

Errors committed in construing will may be corrected on final distribution. *Casement's Estate*, 78 Cal. 141, 20 Pac. 362.

⁹³ *George v. McMullin*, 3 Del. Ch. 269.

Distribution to legatees may be made in kind where possible. *Sinnott v. Kenaday*, 14 App. D. C. 1.

⁹⁴ *Wordins' Appeal*, 64 Conn. 40, 29 Atl. 238; *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22.

⁹⁵ *In re Walkerly*, 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97.

⁹⁶ *Bellows v. Sowles* (C. C.) 53 Fed. 325.

If the probate of the will is annulled, even after decree of distribution, the distributees become trustees for the heirs-at-law.⁹⁷ The latter may pursue the property in the hands of any, except a purchaser in good faith and for value from the distributee prior to revocation.⁹⁸

§ 227. Final settlement

One of the notable reforms introduced by the American system of probate is the limiting of the duration of administration and of the liability of the executor or administrator. At common law there was no provision for a final discharge of such officer. When once accepted the office continued, with all its duties and liabilities, until the death or removal for cause of the executor or administrator. No court had power to wind up the estate and declare the accounts of the executor or administrator closed. By the American statutes a limited time is allowed within which the estate should be fully administered and distributed unless the probate court as occasion requires extends the time. When the estate has been fully administered and all the assets have been properly distributed the executor or administrator is entitled, and it is his duty, to

⁹⁷ *Patterson v. Dickinson*, 193 Fed. 328, 113 C. C. A. 252. Administrator acting in good faith under order afterward set aside entitled to expenses and disbursements: accounts of an executor or administrator, c. t. a. *Rice v. Tilton*, 14 Wyo. 101, 82 Pac. 577.

⁹⁸ *Thompson v. Samson*, 64 Cal. 330, 30 Pac. 980.

make final settlement and secure his discharge. This is done upon notice to all persons concerned, and after a full and final statement of his accounts. Some statutes specifically provide for an order of discharge by the court, which shall be a protection to the executor or administrator and his sureties. It is held that the final settlement is in the nature of a final judgment and is binding as any other judgment unless vacated by appeal, impeached for fraud, or set aside by direct proceedings brought for that purpose.⁹⁹ The Missouri statute does not in terms provide for an order of discharge but it has been decided that one should be made by the court,¹ and having been duly made it has the force and effect of a final judgment.²

The probate court has jurisdiction to render judgment against an executor or administrator for the amount found due on final settlement of his accounts and such judgment is conclusive unless reversed on appeal.³

Final account of an executor should not be ap-

⁹⁹ *Proctor v. Dicklów*, 57 Kan. 119, 45 Pac. 86; *Smith v. Eureka Bank*, 24 Kan. 528; *Northrup v. Browne*, 204 Fed. 224, 122 C. C. A. 496 (Kan.).

Devisee is concluded by settlement of accounts by executor. Estoppel by accepting proceeds of distribution under will. *Batthey v. Batthey*, 94 Neb. 729, 144 N. W. 786.

¹ *Francisco v. Wingfield*, 161 Mo. 564, 61 S. W. 842; *Rogers v. Johnson*, 125 Mo. 202, 28 S. W. 635.

² *State ex rel. v. Gray*, 106 Mo. 526, 17 S. W. 500; *McCrea v. Haraszthy*, 51 Cal. 146.

³ *Greer v. McNeal*, 11 Okl. 519, 69 Pac. 891.

proved and he be discharged until the estate is fully administered,⁴ nor without notice to all parties interested.⁵ It may be set aside only for fraud.⁶

After the lapse of twenty years from the date of the qualification of the legal representatives of an estate, as a general rule it is legitimate to presume that the estate has been fully administered and a distribution had according to law in cases of intestacy, and according to the will where the decedent died testate and the terms of the will do not negative the inference. This presumption is not conclusive, but the burden is upon him seeking to assert a right or title to the estate to remove the same.⁷

⁴ Cowherd v. Kitchen, 57 Neb. 426, 77 N. W. 1107; Lewis v. Barkley, 91 Neb. 127, 135 N. W. 379.

⁵ Musick v. Beebe, 17 Kan. 47.

⁶ Perea v. Barela, 5 N. M. 458, 23 Pac. 766.

⁷ Hodges v. Stuart Lbr. Co., 128 Ga. 735, 58 S. E. 354; Bufford v. Holliman, 10 Tex. 560-575, 60 Am. Dec. 223; Grimes v. Smith, 70 Tex. 217, 8 S. W. 33.

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